Supreme Court, U.S.
FILED
04 6 6 Jul ' 15 2004
OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

JEFFREY ARNOLD HIGGS, *Petitioner,*

v.

PEOPLE OF THE STATE OF COLORADO, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

CRAIG D. JOHNSON
Counsel of Record
8 Garden Center
Broomfield, Colorado 80020
303-466-2335
303-466-6342 Fax

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Did the trial court violate the Defendant's federal constitutional rights of a fair trial and due process as guaranteed Defendant under U.S. Const. Amend. VI and XIV by refusing to include Defendant's tendered jury instruction?

PARTIES TO THE PROCEEDING

The parties to these proceedings are as follows:

1. Petitioner-Appellant, Jeffrey Arnold Higgs

2. Respondents-Appellees, People of the State of Colorado

3. Honorable Randall J. Davis, Broomfield County Court

4. Honorable Donald W. Marshall, Jr., 17th Judicial District Court

5. Colorado Supreme Court

TABLE OF CONTENTS

1.	Caption	
2.	Questions Presented for Review	P. i
3.	List of Parties to the Proceeding	P.ii
4.	Table of Contents	P. iii
5.	Table of Cited Authorities	P. iv-vi
6.	Citations of Official Reports, Unofficial Reports, Opinions and Orders	P. 1
7.	Jurisdiction	P. 2
8.	Constitutional Provisions Involved in the Case	P. 3
9.	Statement of the Case	P. 4-5
10.	Argument	P. 6-16

TABLE OF CITED AUTHORITIES

	Page
1. *Behr v. McCoy,* 138 Colo. 137, 330 P.2d 535 (1958)	7
2. *Carter v. Kentucky,* 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981)	8
3. *Cokley v. People,* 168 Colo. 52, 449 P.2d 824 (1969)	6, 7
4. *Denver Tramway Co. v. Doyle*, 63 Colo. 500, 167 P.777 (1917)	7
5. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 491 (1968)	8
6. *Jones v. U.S.*, 361 F.2d 537 (D.C. Cir. 1965)	14
7. *Kentucky v. Wharton*, 44 U.S. 887, 100 S.Ct. 186, 62 L. Ed. 2d 121 (1979)	9
8. *Missouri v. Todd*, 537 S.W.2d 865 (1976)	16
9. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L. Ed. 2d 492 (1992)	8
10. *Ortega v. People*, 161 Colo. 463, 423 P.2d 21 (1967)	6
11. *People v. Hennion*, 923 P.2d 256 (Colo. App. 1996)	7

12. *People v. Nunez*, 841 P.2d 261 (Colo. 1992) 7

13. *People v. Thiery*, 780 P.2d 8 (Colo. App. 1989) 14

14. *Salley v. U.S.*, 353 F.2D 897 (D.C. Cir. 1965) 14, 19

15. *U.S. v. Anderson*, 739 F.2d 1254 (7 Cir. 1984) 14

16. *U.S. v. Barber*, 442 F.2d 517 (3 Cir. 1971) 9, 10, 11. 16

17. *U.S. v. Dodge*, 538 F.2d 770 (8 Cir. 1976) 15

18. *U.S. v. Evans*, 484 F.2d 1178 (2 Cir. 1973) 15

19. *U.S. v. Hodges*, 515 F.2d 650 (7 Cir. 1975) 11, 12, 14

20. *U.S. v. Holley*, 502 F.2d 273 (4 Cir. 1974) 14

21. *U.S. v. Jackson*, 347 F.3d 598 (6 Cir. 2003) 15, 16

22. *U.S. v. Martinez*, 763 F.2d 1297 (11 Cir. 1985) 14

23. *U.S. v. Masterson*, 529 F.2d 30 (9 Cir. 1976) 15

24.	*U.S. v. McGuire*, 200 F.3d 668 (10 Cir. 1999)	15
25.	*U.S. v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)	10, 11, 13, 14
26.	*U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L. Ed. 2d 1149 (1967)	9
27.	*U.S. v. Wilford*, 493 F.2d 730 (3 Cir. 1974)	14
28.	U.S. Const. Amend. VI	i, 2, 3, 8, 13
29.	U.S. Const. Amend. XIV	i, 2, 3, 8, 13
30.	Tit. 28 U.S.C. §§ 2101, 2104, 2106	2
31.	Supreme Court Rule 10	2, 12
32.	Supreme Court Rule 13	2
33.	C.R.S.§ 42-4-1301	4

CITATIONS OF OFFICIAL REPORTS, UNOFFICIAL REPORTS, OPINIONS AND ORDERS

1. Order of the Colorado Supreme Court dated April 19, 2004, denying Petitioner-Appellant's Petition for Writ of Certiorari is attached as Appendix A.

2. Order of the Honorable Donald W. Marshall, Jr., December 5, 2003, affirming the conviction of Defendant-Appellant is attached as Appendix B.

3. Order denying Defendant's Motion to Set Aside Jury Verdict or in the Alternative Motion for New Trial, Honorable Randall L. Davis, April 7, 2003 is attached as Appendix C.

4. March 5, 2003 Order of the Honorable Randall J. Davis and the judgment of conviction of that same date is attached as Appendix D.

JURISDICTION

Jurisdiction is conferred on this Court as federal constitutional questions involving U.S. Const. Amend. VI and XIV are presented. Review is permitted under Tit. 28 U.S.C. §§ 2101, 2104, and 2106 and Supreme Court Rules 10 and 13. Petitioner seeks review of the Colorado Supreme Court Order denying Petition for Writ of Certiorari entered April 19, 2004, which Petition sought review of the December 5, 2003 Order of the 17th Judicial District Court of Colorado denying appeal of the March 5, 2003 Sentencing Order and conviction and Order on Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial of the trial court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

UNITED STATES CONSTITUTION

ARTICLE VI

Rights of accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE XIV

§1. Citizenship defined - privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts

This is an appeal of the conviction of the Petitioner in the Broomfield County Court of Driving Under the Influence of Alcohol, C.R.S. § 42-4-1301, as amended, after jury trial, and orders entered in that case by the trial court, the subsequent appeal of the district court for the 17th Judicial District affirming the conviction of the Petitioner and affirming the orders of the trial court and an appeal of the Colorado Supreme Court which denied Petitioner's Petition for Writ of Certiorari. Petitioner was charged with driving under the influence and failure to drive in a single lane, both pursuant to a *Summons and Complaint* issued by the Broomfield Police on July 17, 2002.

The case was tried in the County Court of Broomfield before The Honorable Randall J. Davis to a jury of six on January 6, 2003. The Petitioner was acquitted of the charge of failure to drive in a single lane but convicted of driving under the influence of alcohol. The date of entry of conviction was the date of sentencing, March 5, 2003.

Petitioner timely filed his *Notice of Appeal* with the district court after obtaining an extension of time by proper and timely motion for extension of time to file the *Notice of Appeal.*

The sentence imposed on the Petitioner was as follows: thirty days in jail; a fine, costs and statutory surcharges in the total amount of $1,549.00; sixty hours of useful community service; and compliance with the recommendations of the Probation Department, including completion of a Track D Education and Therapy Program, and engagement in monitored sobriety. Post-trial motions for stay of execution of the sentence have all been granted by the trial court and Petitioner's

sentence remains stayed throughout the pendency of this appeal.

After trial, Higgs appealed his conviction to the state district court. The Honorable Donald W. Marshall, Jr. presided over the appeal and affirmed Higgs's conviction. Higgs then filed a Petition for Writ of Certiorari to the Colorado Supreme Court. The Colorado Supreme Court denied Higgs's Petition on April 19, 2004.

Higgs raised the issues of identification and his proposed jury instruction, which are the combined subject of this Petition, at trial (Vol. I, T.T. 6, 2 -10; T.T. 20, 9-14; T.T. 163, 11 - 19, 1; T.T. 238, 16 - 18; Vol. II, T.T. 123, 11 -18); in his Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial (Exhibit 1 to Petition for Writ of Certiorari to the Colorado Supreme Court); in his Notice of Appeal dated April 1, 2003; Higgs's Opening Brief in support of his appeal to the state district court, Section C, P.P. 15-18; Higgs's Reply Brief, Sections B and C, P.P. 3-7; the Order of the Colorado district court, pages 1, 3 and 4, dated December 5, 2003 (Exhibit 2 to Petition for Writ of Certiorari to the Colorado Supreme Court); and in his Petition for Writ of Certiorari to the Colorado Supreme Court., Advisory Listing of Issues Presented for Review, pages 1 and 2, and Section III, pages 7 - 9.

ARGUMENT

Higgs presented the following pertinent argument in his Petition for Writ of Certiorari to the Colorado Supreme Court concerning the federal constitutional issues addressed to this Court in this Petition:

I. The Trial Court erred when it rejected Petitioner's tendered Jury Instruction on identification, and the District Court erred in affirming this ruling.

As a matter of law, the trial court erred when it refused to submit Petitioner's tendered Jury Instruction on identification to the jury. At trial, counsel for Petitioner tendered a proposed jury instruction which read,

> Identification of the defendant as driving at the time and date of the alleged offense is an essential element to be proved beyond a reasonable doubt by the People. If you find that the identification evidence in this case does not inculpate defendant as the driver of the defendant's vehicle beyond a reasonable doubt, then your verdict must be not guilty.

This instruction was a paraphrase of the language in *Cokley v. People*, *citing Ortega v. People*.[1] Although the trial court conceded the Petitioner's tendered jury instruction was a correct statement of the law, it refused to include this tendered jury instruction. This refusal by the trial court caused undue prejudice to Petitioner.

---

[1] *Cokley v. People*, 168 Colo. 52, 449 P.2d 824 (1969), *citing Ortega v. People*, 161 Colo. 463, 423 P.2d 21.

Importantly, the proposed identification jury instruction was a correct statement of the law as iterated in *Cokley*. The proposed instruction was also concise and clear and not redundant guidance for the jury, instructing that identification of Petitioner as the driver of the Higgs's vehicle was the essential predicate to any further deliberation on the guilt or innocence of Petitioner regarding the charged offenses.

An instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory.[2] Colorado has never held that the jury instructions setting forth the elements of the offense and the burden of proof, standing alone, can encompass, embody, or take the place of a defendant's theory of the case.[3] In *Denver Tramway* this Court said,

> There is no question concerning the defendant's right to have the jury properly instructed in a concrete manner upon its theory of the case. . . The defendant is entitled to such instructions.. . unless the court can see that no prejudicial error resulted from such refusal.[4]

Petitioner's instruction on identification did not simply restate what was already encompassed in the instructions on the elements of the specific charges, but it was instead absolutely necessary to instruct the jury in a concrete manner on Petitioner's theory of the case, i.e., that he could not be

---

[2] *People v. Hennion*, 923 P.2d 256 (Colo. App. 1996).

[3] *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

[4] *Denver Tramway Co. v. Doyle*, 63 Colo. 500, 167 P.777 (1917), *quoted in Behr v. McCoy*, 138 Colo. 137, 330 P.2d 535 (1958).

identified beyond a reasonable doubt as the driver of his vehicle. The failure of the trial court to allow the tendered instruction was a violation of Petitioner's right to a fair trial, which again is a matter of statewide concern as it affects a Constitutional right of Petitioner and all other similarly situated persons defending against criminal charges. (*See,* Petition for Writ of Certiorari to the Colorado Supreme Court, Section III.)

It is the above argument Higgs now wishes to make constitutionally more explicit in urging that this Court grant his Amended Petition for Writ of Certiorari and to consider his appeal on its merits.

Higgs is entitled to the constitutionally mandated rights of a fair, speedy, and public trial and both procedural and substantive due process through U.S. Const. Amend. VI and XIV. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L. Ed. 491 (1968); *Morgan v. Illinois,* 504 U. S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). In discussing the need for a specific jury instruction as to a defendant's privilege against self-incrimination, another equally important constitutional right in criminal prosecutions, this Court appropriately stated that "[a] trial judge has a powerful tool at his disposal to protect the constitutional privilege, the jury instruction, and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment..." *Carter v. Kentucky,* 450 U.S. 288, 303 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981). The same principle enunciated in *Carter* must apply to an instruction on identification when, as here, identification is the sole issue, there is no witness at trial who can positively identify the defendant as the alleged perpetrator of the crime, and there is little or no other evidence of the crime as to the defendant on trial. Granted, it is not always error for a trial court to refuse to give a limiting instruction, which may be requested by a defendant in circumstances, for example, where other

evidence of the defendant's guilt is overwhelming and there is credible evidence of a defendant's identification. *Kentucky v. Wharton,* 100 S. Ct. 186 (1979). However, in the case on Petition, the evidence of identification and all other evidence linking Higgs as the driver of his vehicle is nearly non-existent. The case on Petition is a perfect example of the hazards warned against by this Court when Justice Brennan wrote in *United States v. Wade,* 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L. Ed. 2d 1149 (1967) the following:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontroverted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent, not due to the brutalities of ancient criminal procedure.'

In *United States v. Barber,* 442 F.2d 517 (3 Cir. 1971), the Court of Appeals reviewed the convictions of seven defendants. Four of the convictions were upheld, but three were overturned and those three cases were sent back to the lower court. The *Barber* court spent considerable time analyzing the necessity of specific instructions on key constitutional issues, such as, identification, especially in states, (e.g., now also including Colorado) which employ pattern jury instructions. In *Barber,* the court recognized "a compelling need for guidelines which will obviate skeletal, pattern instructions and assure the essential particularity demanded by the facts surrounding each identification." *Id* at 528. The *Barber* Court of Appeals went

on to clarify and distinguish the test for a more particular identification instruction in stating:

> In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict or uncertainty on the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.
> *Id* at 528.

Barber, like some other courts, recognized the case of *United States v. Telfaire,* 469 F.2d 552 (D.C.Cir. 1972) as the

benchmark for identification jury instruction guidance. *Barber* and *United States v. Hodges,* 515 F.2d. 650 (7 Cir. 1975) both recognize that identification jury instructions are discretionary with the trial court, but only to a point. The *Hodges* court emphasized that "in cases where identification is a key issue, [trial courts should] include an identification instruction which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." *Id* at 652, citing *Telfaire* as additional authority. The *Hodges* court emphasized:

> that neither the summation of counsel at the close of the evidence, however prolonged or explicit, nor cross-examination as to the matter of identification by defense counsel adequately protects a defendant against the dangers of misidentification which are inherent in eye witness testimony... In cases such as the present, where the issue of identification is paramount, we define proper instructions to include an identification instruction, when it is tendered to the court, in addition to accurate instructions as to burden of proof and the credibility of witnesses. As the District of Columbia Circuit stated in Salley v. United States, 122 U.S. App.D.C. 359, 353 F.2d 897, 899 (1965): It is the obligation of the trial judge 'to instruct the jury that if there was a reasonable doubt as to the identification of the defendant as the person who (committed the crime), then the jury should acquit.'
> *Id* at 654.

At Higgs's trial, the prosecution, defense and trial court all recognized that the sole issue to be decided was

identification. (See, Vol. I T.T. 6, 2-10; 20, 9-14; 165, 17-21) The state district court also agreed in its opinion that identification was the sole issue. (See P.1, District Court Order) A review of the trial transcript reveals that there was only one witness who purportedly could make some identification, Mr. White, but even he could not positively identify Higgs as the driver of the vehicle in question, not either at the time of the alleged offense, before or during trial, not ever. The jury instruction tendered by Higgs, but rejected by the trial court, would have properly focused the jury on the sole issue at trial, which was of constitutional magnitude. Neither the pattern jury instruction of credibility of witnesses, the elements of the offense instruction, nor the combination of any other instructions that actually went to the jury during Higgs's trial, provided the guidance the jury needed nor the constitutional protection to which Higgs was entitled. *(See,* Jury Instruction numbers 5 and 9.) By not including Higgs's proposed instruction, Higgs's theory of his case was precluded and the burden of persuasion was impermissibly shifted from the People to Higgs. As recognized in *Hodges,* arguments of Higgs's counsel and cross-examination of the identification witness were inadequate substitutes for the jury instruction tendered by Higgs, but rejected by the trial court. The Higgs trial court had an obligation to submit the jury instruction offered by Higgs on the critical identification element as a part of Higgs's theory of his case, especially in light of the dearth of identification evidence, the lack of any positive identification at any time by the sole witness on that issue, and since the trial court acknowledged the instruction tendered by Higgs was a correct statement of the law.

One standard for appellate review by this Court is if there is disagreement among the various circuit courts of appeal on the same important matter. U.S. Supreme Court Rule 10. Below is a summary demonstrating by the primary cases

concerning identification instructions that there is no uniformity among the circuits on this important matter. An issue of this magnitude needs the certainty of a ruling by this Court to bring uniformity in the approach to this constitutional question and to assure fair and just application of the procedures at trial concerning identification instructions to all defendants ensuring them fair trials, process that is due and equality under the law.

To preface the analysis below, Higgs argues that a *Telfaire*-like instruction, or at a minimum, the instruction proffered by Higgs, must be given in every case in which there is one eye witness and little, if no, corroborating evidence of identification, and little other evidence, if any, of the crime with which a defendant is charged. Colorado's pattern general credibility instruction, as was relied upon in conjunction with the pattern elements of the offense instruction in the case on Petition, were not constitutionally sufficient to protect Higgs's XIV Amendment due process and VI Amendment fair trial rights. Thus, reversal of his conviction is required.

Reviewing the pertinent federal appellate circuits, the cases fall into four main categories with virtually no consistency of application:

A. SPECIFIC IDENTITY INSTRUCTION MUST BE GIVEN

D.C. Circuit - *U.S. v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972), set the benchmark for a more definite and constitutionally protective identification instruction, but mandated the instruction based on a totality of the circumstances of each case test. However, the *Telfaire* court did indicate that such an instruction is imperative.

7th Circuit - *U.S. v. Hodges,* 515 F.2d 650 (7th Cir. 1975), indicates that a specific instruction must be given when identification is the only issue; there is only one witness on the issue of identification; and that failure to give the instruction cannot be cured by arguments of counsel or cross-examination. See also, *U.S. v. Anderson,* 739 F.2d 1254 (7th Cir. 1984), citing *Hodges.*

DC Circuit - *Salley v. U.S.,* 353 F.2d 897 (D.C. Cir. 1965), generally follows *Telfaire,* but again emphasizes the importance of the identification and that there is substantial likelihood of mistake in identification cases.

4th Circuit - *U.S. v. Holley,* 502 F.2d 273 (4th Cir. 1974), directed the courts to adopt the *Telfaire* instruction in cases involving a single witness as to the issue of identification.

B. NO IDENTIFICATION INSTRUCTION NEEDED WHEN GENERAL CREDIBILITY INSTRUCTION IS GIVEN

11th Circuit - *U.S. v. Martinez,* 763 F.2d 1297 (11th Cir. 1985), stands for the rule that if there is a general credibility instruction given, then no specific instruction on identification is needed. This same stance is taken in *Jones v. U.S.,* 361 F.2d 537 (D.C. Cir. 1965) of the D.C. Circuit (which is directly contrary to *Telfaire* in the same Circuit), and *U.S. v. Wilford,* 493 F.2d 730 (3rd Cir. 1974), in the 3rd Circuit.

Colorado Court of Appeals– *People v. Thiery,* 780 P.2d 8 (Colo. App. 1989), mandates that if there is a positive identification, other evidence of the defendant's guilt; and the general credibility instruction given, then no *Telfaire* – like instruction is required. The situation in *Thiery* also included the point that, unlike in the case on Petition, the jury instruction

tendered by the defense was neither a correct statement of the law, nor of the facts.

C. POSITIVE IDENTIFICATION REQUIRES NO SPECIFIC IDENTIFICATION INSTRUCTION

2nd Circuit - *U.S. v. Evans,* 484 F.2d 1178 (2nd Cir. 1973), determined that if there was a positive identification, then no specific identification instruction is needed and the standard for review is whether the trial court abused its discretion.

9th Circuit - The *U.S. v. Masterson,* 529 F.2d 30 (9th Cir. 1976), case lines up for the same principles as those summarized from *Evans* above.

10th Circuit - *U.S. v. McGuire,* 200 F.3d 668 (10th Cir. 1999), follows the reasoning of both *Evans* and *Masterson,* but pays special attention to the identification witness' ability to observe the alleged perpetrator, and requires a case by case analysis using the standard of abuse of discretion by the trial court.

D. OTHER POSITIONS BY OTHER COURTS

8th Circuit - *U.S. v. Dodge,* 538 F.2d 770 (8th Cir. 1976), involved a positive identification, which did not require reversal of the conviction, but the court remained "deeply concerned" about the issue of possible misidentification.

6th Circuit - *U.S. v. Jackson,* 347 F.3d 598 (6th Cir. 2003), articulated a three prong test for determining whether the failure to give a specific identification instruction was reversible error. All three prongs must be present to require a specific instruction on identification. *Jackson* wrote in

pertinent part: " A district court's refusal to deliver a requested jury instruction [is] reversible error only if the instruction (1) is not a correct statement of the law; (2) was not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *Id* at 606. This test is different than the case by case, abuse of discretion standard in place in the 2nd, 9th and 10th Circuits.

D.C. Circuit - *U.S. v. Barber,* 442 F.2d 517 (3rd Cir. 1971), provides yet another approach to the same issue by issuing a four part test to see if a specific identification jury instruction should be issued. (*See, Barber, supra.)* If any one of the four parts is missing, then a specific identification instruction is required.

Other State Courts - For, example, the Missouri appellate court in *Missouri v. Todd,* 537 S.W. 2d 865 (1976), has ruled that no specific identification instruction is needed if the issue is fairly included in the other instructions, whatever that nebulous standard means.

CONCLUSION

With the various circuits and state courts enunciating widely differing standards affecting a basic, but highly important constitutional right, and in particular to the case on Petition, where there is a single witness on the issue of identification, little or no evidence of the defendant's commission of the alleged crime, and the refusal by the court to submit a specific identification instruction that is not only a correct statement of the law, but which also goes to the stipulated single issue, the heart and soul of the prosecution of Defendant, this Court is urged by Petitioner to accept his appeal for review. Petitioner's liberty is at stake and it should not be jeopardized by an error so fundamental, such as the one that occurred in this case.

Dated: November 15, 2004

Craig D. Johnson
Counsel of Record
8 Garden Center
Broomfield, Colorado 80020
303-466-2335
303-466-6342 Fax

Counsel for Petitioner

(2)

Supreme Court, U.S.
FILED

04 6963 JUN 15 2004

OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

JEFFREY ARNOLD HIGGS, *Petitioner,*

v.

PEOPLE OF THE STATE OF COLORADO, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO STATE SUPREME COURT

APPENDIX

CRAIG D. JOHNSON
Councel of Record
8 Garden Center
Broomfield, Colorado 80020
303-466-2335
303-466-6342 Fax

Counsel for Petitioner

TABLE OF CONTENTS

Page

Appendix A: Order Denying Petition for Writ of Certiorai by the Colorado Supreme Court dated April 19, 2004..... 1-3

Appendix B: Order of 17th Judicial District Court dated December 5, 2003..... 4-11

Appendix C: Order of Broomfield County Court Denying Defendant's Motion to Set Aside Jury Verdict, or in the Alternative, Motion for New Trial dated April 7, 2003..... 12-14

Appendix D: Order of Broomfield County Court and Judgment of Conviction dated March 5, 2003..... 15-20

Appendix E: Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial dated February 28, 2003..... 21-28

Appendix F: Petition for Writ of Certiorari to the Colorado Supreme Court dated January 9, 2004..... 29-76

Appendix G: C.R.S. §42-4-1301..... 77-88

APPENDIX A

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203
Case No. 04SC23

Received APR 21, 2004
Craig D. Johnson & Assoc.

CERTIORARI TO DISTRICT COURT, BROOMFIELD COUNTY, 03CV68
COUNTY COURT,
BROOMFIELD COUNTY,
02T712

Petitioner:
JEFF ARNOLD HIGGS,

v.

Respondent:
THE PEOPLE OF THE STATE OF COLORADO,

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the District Court of Broomfield County, and after review of the record, briefs, and the judgment of said district court,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 19, 2004.

Seal on original

Copies mailed via the State's Mail Services Division on 04/19/04. MLK

Craig D. Johnson
8 Garden Center
Broomfield, CO 80020

Michael J. Milne
Sr. Deputy District Attorney
450 South Fourth Ave.
Brighton, CO 80601

Clerk of the Court
Broomfield County Court
17 DeCombes Dr.
Broomfield, CO 80020

Honorable Randall J. Davis
Broomfield County Court
17 DeCombes Dr.
Broomfield, CO 80020

Honorable Donald W. Marshall
Broomfield County Court
17 DeCombes Dr.
Broomfield, CO 80020

s/_____

APPENDIX B

DISTRICT COURT, BROOMFIELD COUNTY, COLORADO
Case No. 2003CV68, Div: A, Ctrm: 2
Court Address: 17 Descombes Drive, Broomfield, CO 80020

JEFF ARNOLD HIGGS
Appellant,

v.

PEOPLE OF THE STATE OF COLORADO
Appellee.

ORDER

This is an appeal from the County Court for Broomfield County. The court has received and reviewed the certified record from the County court and the briefs of the parties. The Court now dispenses with oral argument and rules on the appeal as stated herein.

On July 17, 2002, the appellant was charged with driving under the influence and failure to drive in a single lane. The case was tried before the Honorable Randall J. Davis and a jury of six on January 6, 2003. Appellant was acquitted of the charge of failure to drive in a single lane and convicted of driving under the influence. The defendant raises the following issues for appellate review: (1) Has appellant's constitutional right to a speedy trial been violated; (2) Did the trial court err when it denied appellant's motion for judgment of acquittal; (3) Did the trial court err when it rejected appellant's tendered jury instruction on Identification; (4) Did the trial court err by not granting a mistrial based on statements made during the prosecution's closing arguments.

I. Speedy trial

Appellant asserts a violation of his constitutional right to a speedy trial. The appellant has not asserted a statutory right to a speedy trial under C.R.S. 18-4-104, as the record reflects that a trial was held within one-hundred and eighty days from the initial plea of not guilty. In fact, the trial was held less than six months after the date of the offense. Defendant bases his denial of his right to speedy trial on a forty-two day delay between the time he first offered a not guilty plea to the date the court accepted the plea.

The constitutional right to a speedy trial, derived from U.S Const. Amend. 6, and Colo. Const. art. II. § 16, is distinct from the statutory speedy trial right and the determination as to one does not necessarily dispose of the other. People v. Hogland, 543 P.2d 1298 (1975).

The defendant carries the burden of proving a violation of a right to a speedy trial. People v. Velasquez, 641 P.2d 943 (Colo. 1982). Whether a defendant's speedy trial right has been violated is determined by a balancing of four factors: the length of the delay; the reason for the delay; the defendant's assertion of his right to a speedy trial; and the prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 (1972). The purpose of the balancing analysis is to protect the defendant from undue prejudice. Prejudice may include, *inter alia,* the impact of the delay upon the ability to present a defense, upon the availability of evidence, and upon the cost of the proceedings. People v. Harris, 914 P.2d 425 (Colo. App. 1995). Where the period intervening between the initial filing of the criminal complaint and trial was neither excessive nor unjustified, and where the defendant failed to establish that his defense was in any manner prejudiced, the defendant was not denied constitutional right to speedy trial. People v. Velasquez, 641 P.2d 943 (1982).

The appellant has not made any showing of facts sufficient to establish that the forty-two day delay to set his

case for trial, adversely impacted his ability to present a defense. He has not demonstrated that any evidence became unavailable, or that the delay caused him to incur additional costs. Rather, the appellant asserts a violation of his speedy trial right from the anxiety caused by being forced to wait an extra forty-two days to set a trial date. The appellant's anxiety is unfortunate, but the delay must operate as a prejudice, and thus, the appellant's anxiety is a non-consequence. The appellant has failed to establish that his defense to the charges was in any manner prejudiced by the period intervening between the filing of the complaint and the trial date.

II. Motion for Judgment of Acquittal

Appellant asserts that the trial court improperly denied his motion for judgment of acquittal. Specifically, Appellant contends there was insufficient evidence to find guilt beyond reasonable doubt.

Upon a defendant's motion for judgment of acquittal, the prosecution is given the benefit of every reasonable inference which might be fairly drawn from the evidence. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996). The proper standard to be applied to a defendant's motion for acquittal is whether the relevant admissible evidence, both direct and circumstantial, when viewed in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. People v. Gonzales, 666 P.2d 123 (Colo. 1983) (emphasis added). Finally, a court properly denies a defendant's motion for judgment of acquittal at the conclusion of all of the evidence where the question of credibility of the witnesses and the

ultimate guilt of defendant remain, for such matters are for the jury's determination. Roybal v. People, 493 P.2d 9 (1972).

The record reflects that the only issue with regard to the driving under the influence charge was whether the appellant was driving his vehicle on the night in question. At trial, defendant offered evidence that his wife was driving the vehicle and he was a passenger. However, a witness testified that a male with short black hair was driving the appellant's vehicle on the night in question. The vehicle was later parked in appellant's garage, with one person seated in the driver's seat. Moments later the appellant was standing behind the vehicle.

This testimony gives rise to a reasonable inference that appellant drove the vehicle home. The court finds that the record contains ample circumstantial evidence to permit the jury to conclude that the appellant committed the offense of driving under the influence. Therefore, the trial court correctly reserved the issue of ultimate guilt for the jury's determination.

Defendant also argues that since the jury found defendant not guilty of failure to drive in a single lane the verdicts in the case are inconsistent. He argues the jury had found he was not driving for one count and was driving for the other. This argument is unpersuasive as there is no reason for this court to conclude that the jury's verdict of not guilty on the driving in a single lane was based on the identity of driver.

For the reasons stated herein, the court concludes the county court did not err in denying appellant's motion for judgment of acquittal.

III. Jury Instructions

The appellant also contends that the trial court erred when it refused to tender his jury instruction. If a tendered instruction sets forth a theory of the case which amounts to nothing more than a general denial of the act, or if the instruction is *already encompassed in other instructions*, the defendant is not entitled to have his theory of the case reiterated in a separate instruction. People v. Young, 710 P.2d 1140 (Colo. App. 1985) (emphasis added).

In the present case, the appellant tendered an instruction to the court which explained to the jury the issue of identification. However, the court had already provided instructions including the elements of the crime that must be proven. These elements were in instruction number nine and included an instruction that it was necessary to determine that the defendant drove the vehicle. Therefore, the trial court did not err for refusing to tender the appellant's duplicate instruction to the jury.

IV. Closing Arguments

The appellant also contends that the trial court erred by not granting a mistrial based on statements made during the prosecutor's closing argument.

When an alleged error consists of prosecutorial misconduct and was not preserved by a contemporaneous objection, it will not be considered on appeal unless it was plain error affecting the substantial rights of the defendant. Taylor v. People, 723 P.2d 131 (1986). The determination whether closing argument is improper is a matter committed

to the discretion of the trial court. People v. Shepherd, 43 P.3d 693 (Colo. App. 2001).

The record indicates that the appellant did not make an objection to the prosecutor's statements during closing arguments. Therefore, the only issue for the court's consideration is whether it was plain error when the ~rial court, *sua sponte,* did not declare a mistrial.

The court recognizes that our system of justice cannot tolerate verdicts based on bias and prejudice rather than on relevant facts and applicable law. However, given the trial court's broad discretion, the record reveals that the statements made by the prosecutor did not amount to such a level as to constitute plain error within the meaning of Crim. P. 52(b).

For the reasons stated herein, the conviction of appellant in the county court is affirmed.

Dated at Broomfield, Colorado this 5th day of December, 2003.

By the court:

s/ Donald W. Marshall, Jr.
Donald W. Marshall, Jr.

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via JusticeLink (e-file) to all counsel of record and mailed by the Court to all pro se parties this 5th day of December, 2003.

s/_____
Division Clerk

APPENDIX C

Work with Register of Action

1/08/04 2:38 P.M.

Status: ROPN
County Court, Broomfield County
Case #: 2002T712 Div/Room: 1

The People of Colorado

vs.

HIGGS, JEFF ARNOLD

Type: Driving Under the Influence
FILE DATE 03/05/2003

EVENT DESCRIPTION	**SCHD**	**DATE**	**TIME**	**ROOM**

Minute Order (print)
3/5/03
3-503
SENTENCING/MOTIONS HEARING: DEFT APPEARED WITH ATD. C. JOHNSON. DDA L. BECK FOR THE PEOPLE. CT. IS IN RECEIPT OF DEFENSE MOTION TO SET ASIDE JURY VERDICT OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL. CT. HEARS ARGUMENT OF COUNSEL AND AFFIRMS THE JURY'S VERDICT. DEFENSE MOTIONS ARE DENIED. MATTER PROCEEDS TO SENTENCING. ***ORDER: 2 YEARS PROBATION, 60 HRS UPS, $1,000 FINE AND CT COSTS IMPOSED. DEFT TO SERVE 30 DAYS JAIL AS CONSECUTIVE WEEKENDS FRI-SUN AT 8:30 PM TO START APRIL 11, 2003 AT 8:30 PM. ATD NOTIFIES THE COURT THAT AN APPEAL WILL BE FILED AND CT ORDERS APPEAL TO BE FILED IN 30 DAYS. CT

SETS APPEAL BOND IN THE AMOUNT OF F&C, TO BE POSTED AT THE TIME OF FILING OF APPEAL.

/DMC

03/05/2003 04/07/2003 07:00 AM 1
Judicial Officer.....:RANDALL JOSEPH DAVIS

More...

F3= Exit F5=Refresh F6=Print F10=Jump
F12=Cancel F24=More keys

APPENDIX D

County Court, Broomfield County, State of Colorado
Case #: C0802002T 000712 Div/Room: 1

JUDGMENT OF CONVICTION, SENTENCE Original

The People of Colorado vs. HIGGS, JEFF ARNOLD
DOB 10/04/1954 SID

The Defendant was sentenced on: 3/05/2003
People represented by...: BECK, LORI
Defendant represented by: JOHNSON, CRAIG
UPON DEFENDANT'S CONVICTION this date of: 1/6/2003
The defendant pled guilty to:
Count # 1 Charge: Driving Under the Influence
C.R.S. # 42-4-1301(1)(a) Class: M
Date of offense(s): 7/18/2002 to 7/18/2002 Date of finding(s): 1/06/2003

IT IS THE JUDGMENT/SENTENCE OF THIS COURT that the defendant be sentenced to

Probation Alcohol Supervisio	2.00 YEARS	COUNT 1
Jail	30.00 DAYS	COUNT 1

JAIL SENTENCE TO BE SERVED AS CONSECUTIVE WEEKENDS, FRI-SUN AT 8:30 PM
TO START APRIL 11, 2003 NO LATER THAN 8:30 P.M.
/DMC

Assessed	Balance
$1,549.00	$1,549.00

ADDITIONAL REQUIREMENTS

Complete 60.00 hours of Useful Public Service

CONSECUTIVE WEEKENDS

JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:

DATE: 3/5/03 NPT_____ JUDGE/MAGISTRATE_____

s/ Randall J. Davis

RANDALL JOSEPH DAVIS

CERTIFICATE OF SHERIFF

I CERTIFY THAT I EXECUTED THIS ORDER AS DIRECTED

DATE_____ SHERIFF_____

BY DEPUTY_____

FILED IN BROOMFIELD COUNTY COMBINED COURT
MARCH 05, 2003
Case Number 02T712 Div. 1 ID Number_____

THE PEOPLE OF THE STATE OF COLORADO

vs.

JEFF ARNOLD HIGGS, DEFENDANT
CONDITIONS OF PROBATION/SENTENCE, FOR THE OFFENSE(S) OF: DUI

__xx__ You are hereby sentenced to a term of probation for a period of 24 __xx__ months/years.
_____ Probation reinstated
and shall comply with the following conditions and those listed in Section (A)(B) on the reverse side of this form. You may be supervised in specialized programs, ad determined by the Probation Department, with additional conditions imposed.
__xx__ YOU ARE ORDERED TO REPORT IMMEDIATELY TO THE:
__xx__ CLERKS OFFICE __xx__ PROBATION DEPT.
____ ALCOHOL UNIT ____ INTERVENTION ____ RMOMS
_____ You are hereby sentenced to a term of unsupervised probation for a period of _____ Months. You need not report to any probation office, as your case will be reviewed by the Court.
As a condition of your sentence, you shall pay:
TOTAL FINES & COSTS: $1,000 + $349 + 200
payable to: CLERK OF THE COMBINED COURT

****IF YOU ARE IN CUSTODY, YOU MUST APPEAR WITHIN 48 HOURS OF YOUR RELEASE FROM JAIL****

_____ A supervision fee of $35 per month is to be paid directly to INTERVENTION.

CONDITIONS OF PROBATION/SENTENCE:

You shall participate in, cooperate with, pay any fees required, and successfully complete the following:

___ 1. Substance abuse evaluation/treatment
___ 2. Mental health evaluation/counseling or treatment
___ 3. a. Domestic violence evaluation
b. Domestic Violence counseling
xx 4. Useful Public Service of 60 hours to be completed by _____.
___ 5. Level I alcohol education.
xx 6. Level II alcohol education BAC .224 PRIORS 2
xx 7. Level II alcohol therapy 86 hours
___ 8. Intensive outpatient substance abuse treatment
___ 9. Aftercare_____ as required by treatment/probation
xx 10. Monitored sobriety required by treatment/probation
Antabuse (Circled)
Urine screens (Circled)
Breath screens (Circled) (circle)

Track D on weekends Friday 8:30 a.m. to Sunday 8:30 p.m. (Handwritten on document)

___ 11. MADD Victim Impact panel
xx 12. Jail for 30 days suspended to 30 days beginning on 4/11/03 at 8:30 p.m.

_____ Work release _____ Treatment release
Type: _____
_____ Electronic Monitoring for ___ Day(s)
on/before_____

___ 13. Get alcohol evaluation and treatment as recommended.
___ 14. Other:_____
__ No contact order vacated __ No contact order continues for term of supervision
I have received a copy of these conditions and have read them carefully with full understanding. I understand that if I violate these conditions or those listed on the reverse of this form, I may be brought before the Court for revocation and imposition of sentence.
JUDGE: Randal J. Davis Date 3/5/03
Defendant: Jeff Higgs Date_____
Address_____ City_____ Zip_____
Phone (home)_____ (work)___ Social Security Number___
_____

APPENDIX E

COUNTY COURT, BROOMFIELD COUNTY, COLORADO
Case No. 02T712
Court Address: 17 Descombes Drive, Broomfield, Colorado 80020
Phone Number : 303-438-6365

Plaintiff:
PEOPLE OF THE STATE OF COLORADO

Defendant:
JEFF ARNOLD HIGGS

Attorney:
Craig D. Johnson & Associates, P.CC.
Craig D. Johnson, #11902
Susan M. Spaulding, #30068
8 Garden Center
Broomfield, CO 80020
Phone: 303-466-2335
Fax: 303-466-6342
E-mail: cdj@lawyer.com

MOTION TO SET ASIDE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Defendant, by and through his attorneys, Craig D. Johnson & Associates, P.C. renews his motion for acquittal to this Court, pursuant to C.R.Crim.P. 29(c), and moves for an Order setting aside the verdict rendered in this case on January 6, 2003, or in the alternative, pursuant to

C.R.Crim.P. 33, for an Order for a new trial, and as grounds therefor states:

1. This action involves an alleged driving under the influence offense that occurred in the City and County of Broomfield, State of Colorado on July 18, 2002.

2. Trial to a jury was held before this Court on January 6, 2003 on two charges,

Driving a Vehicle Under the Influence of Alcohol and Failure to Drive in a Single Lane.

3. After presentation of all the evidence, the jury found the Defendant not guilty on the charge of Failure to Drive in a Single Lane and guilty on the charge of Driving a Vehicle Under the Influence of Alcohol. This result is totally inconsistent with any reasonable conclusion drawn from the evidence and the jury's verdict should be set aside and a judgment of acquittal must be entered in favor of the Defendant.

4. The defense stipulated that the Defendant had a blood alcohol level of .224 on the evening of July 18, 2002.

5. Further, and most importantly to the merits of this motion, the prosecution and defense agreed on the record at trial that the only issue for jury consideration was whether or not it was the Defendant who was driving his vehicle on the evening of July 18. *See* T.Ct.R. p.6, lines 2-10; p. 20, lines 9-14 and lines 18-21. Essentially, this meant that the jury did not have to decide the other elements of each offense with which the Defendant was charged, because all other elements of each offense were not being contested by Defendant.

6. The only witness who testified that he saw the Defendant's vehicle weaving in and out of its traffic lane was Zachary White. Mr. White testified that his attention was first called toward Defendant's vehicle when he noticed the vehicle "swerving into the southbound lanes of Lowell Boulevard at 136th at approximately 10:22 p.m. on July 18, 2002. . .". Mr. White then testified that the vehicle "swerved back into the . . . northbound lanes . . . [a]nd . . . turned westbound onto 136th, [where] he nearly hit several street signs, so that's when I decided to call [the police]." *See* T.Ct.R. p. 89, lines 6-7 and lines 16-18. This evidence was not rebutted or refuted by Defendant whatsoever. Therefore, one can only come to the reasonable conclusion that when the jury found Defendant not guilty of the offense of Failure to Drive in a Single Lane, they concluded that the only element they had to determine as the trier of fact; i.e. whether Defendant was or was not driving, that Defendant was not driving.

7. The jury clearly did not find Mr. White's testimony regarding his observations on the night of July 19, 2002 to be credible, because it found the Defendant not guilty of Failure to Drive in a Single Lane. It is impossible to swerve back and forth between the northbound and southbound lanes of a road, or to nearly hit several street signs, as described by Mr. White, without driving out of a single lane.

8. It should be noted that the defense put on three witnesses, the Defendant, his wife, Janet Higgs, and Bruce Goldberg, all three of whom testified that the Defendant did not drive his vehicle on the evening of July 18, 2002. Also, there is no evidence presented which showed that Defendant

was, in fact, driving on the date of the alleged offense. Although the jury, as trier of fact, has the right to believe or disbelieve all or a portion of witness testimony, a reasonable person sitting as trier of fact cannot find Defendant was not driving for the purpose of one offense, yet driving for the purpose of another offense, especially when the evidence is uncontroverted as to the guilt of the Defendant, if he was found to be driving, with respect to the offense on which he was found not guilty.

9. The only issue the jury had to determine in this case was whether the Defendant was driving his vehicle on the evening of July 18, 2002. The test for evaluating a motion for acquittal where the Defendant's guilt is proven by circumstantial evidence, is whether there is evidence in the record from which a jury can find beyond a reasonable doubt that the circumstances are such as to include every reasonable hypothesis of innocence. *People v. Naranjo*, 181 Colo. 273, 509 P.2d 1235 (1973). Given the unique circumstances of the case at bar and the narrow contested issue in this trial, no reasonable trier of fact could conclude Defendant was not guilty, and thus not driving, on one charge, yet find Defendant guilty, and therefore driving, on another charge.

10. The defense twice during the trial moved for acquittal based on insufficient evidence identifying the Defendant as the driver of his vehicle. Both motions were denied by the Court. *See* T.Ct.R. p. 163, line 11 - p. 165, line 23; p. 238, line 16 - p. 239, line 4.

11. Pursuant to C.R.Crim.P. 29(c), and based on the evidence before the Court, the Defendant now renews his

motion for acquittal and moves this Court for an Order setting aside the verdict rendered by the jury in this case on January 6, 2003.

12. In the alternative, pursuant to C.R.Crim.P. 33, Defendant now moves for a new trial.

13. Defendant asserts that the jury in this trial was either confused or disregarded the instructions it was required to follow. Defendant tendered a proposed jury instruction to the Court which read,

> "Identification of the defendant as driving at the time and date of the alleged offense is an essential element to be proved beyond a reasonable doubt by the People. If you find that the identification evidence in this case does not inculpate defendant as the driver of the defendant's vehicle beyond a reasonable doubt, then your verdict must be not guilty." The inclusion of the tendered instruction by the defense was denied by the Court and counsel for the defense objected at the time. *See* T.Ct.R. p. 123, lines 11-18.

14. The proposed jury instruction was a correct statement of the law and it correctly instructed the jury as to the narrow issue the jury had to determine at trial The Trial Court's failure to instruct the jury using Defendant's tendered instruction was error. This error caused Defendant undue prejudice and the error was not harmless error.

15. Defendant asserts that based on the evidence and narrow issue that was to be decided by the jury at trial, it was reversible error for the Court to deny Defendant's jury instruction regarding identification of the Defendant and to

-26a-

deny Defendant's two motions for acquittal made at trial.

16. The purpose of filing this motion to set aside the jury's verdict or for a new trial is to allow this Court a chance to correct its errors. *Losavio v. District Court, 182 Colo. 186, 512 P. 2d 264 (1973).* In the case at bar, not only has this Court made reversible error by not instructing the jury with the tendered instruction, but the combination of lack of that instruction and viewing the evidence in the light most favorable to the People, Defendant repeats that the jury's verdicts are not reasonable and are totally at odds with the evidence in this case. Defendant asserts that it would be an abuse of discretion by this Court if it denies this motion. *People v. Jones, 942 P.2d 1258 (Colo. App. 1996).*

17. For all the reasons above and in the best interests of justice, the relief sought herein must be granted.

Dated: February 28, 2003

CRAIG. D. JOHNSON & ASSOCIATES, P.C.

s/ Mardi Moore #28766 for
Craig D. Johnson, #11902
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of February, 2003, I have deposited a true and correct copy of the above and foregoing **MOTION TO SET ASIDE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL** in the U.S. Mail, postage prepaid, addressed to:

Office of the City Attorney
City of Broomfield
One DesCombes Drive
Broomfield, CO 80028-1415

s/ Lynne Gallagher

APPENDIX F

COLORADO SUPREME COURT
Court Address: 2 East 14th Avenue, 4th Floor, Denver, CO 80203
Phone No. 303-861-1111

DISTRICT COURT, COUNTY OF BROOMFIELD, COLORADO
Judge Donald W. Marshall
Case No. 03CV68

Petitioner/Appellant:
JEFF ARNOLD HIGGS
Appellees:
THE PEOPLE OF THE STATE OF COLORADO

Attorney:
CRAIG D. JOHNSON & ASSOCIATES, P.C.
By: Craig D. Johnson, 8 Garden Center, Broomfield, CO 80020
Phone No. 303-466-2335
Fax No. 303-466-6342
E-Mail: cdj@lawyer.com

PETITION FOR WRIT OF *CERTIORARI*

Petitioner, Jeff Arnold Higgs, by and through his attorneys Craig D. Johnson & Associates, P.C. and pursuant to C.A.R. 49 and 53 submits the following Petition for Writ of *Certiorari*:

ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

Petitioner asserts that, pursuant to the provisions of C.A.R. 50, the following issues must be reviewed by the Colorado Supreme Court as they involve matters of substance not heretofore determined by the Supreme Court, C.A.R. 50(a)(1); or that the issues presented decide important State questions which have not been, but should be, determined by the Supreme Court. C.A.R. 50(a)(2) The advisory listing of issues presented for review is as follows:

1. As a matter of law, did the trial court err when it refused Petitioner's written plea of not guilty and waiver of advisement of rights under Colo.R.Crim.P. 5 on July 30, 2002, thereby violating Petitioner's right to a speedy trial and did the district court err in affirming the trial court's ruling?

2. As a matter of law, did the trial court err when it denied Petitioner's *Motion to Set Aside Verdict or for Judgment of Acquittal* on March 5, 2003 and did the district court err in affirming the trial court's ruling?

3. As a matter of law, did the trial court err when it rejected Petitioner's tendered Jury Instruction on identification and did the district court err in affirming the trial court's ruling?

4. As a matter of law, did the trial court err by not declaring a mistrial based on the improper argument by the People during closing arguments of facts not in evidence and did the district court err in affirming the trial courts' ruling?

OFFICIAL REPORTS OF THE OPINIONS SOUGHT TO BE REVIEWED

1. Pursuant to C.A.R. 53(a)(2), copies of the following Orders which are subject to review under this Petition are contained in Appendix "A" attached : *Order* of the Broomfield County District Court (Appellate Court) dated December 5, 2003, affirming the conviction by Broomfield County Court (Trial Court); *Mittimus* issued by Broomfield County Court on March 5, 2003; *Order and Judgment* of the Trial Court dated March 5, 2003; and Petitioner's *Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial* filed February 28, 2003.

JURISDICTION OF THE SUPREME COURT

Jurisdiction is conferred on the Colorado Supreme Court pursuant to C.A.R. 49 , 50 , and C.R.S. § 13-6-310, and this Petition seeks review of the following judgments, decrees or orders:

1. Petitioner's *Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial* filed February 28, 2003;

2. *Judgment* of conviction of the Broomfield County Court entered on March 5, 2003;

3. *Mittimus* issued by the Broomfield County Court entered on March 5, 2003; and

4.*Order* of the Broomfield County District Court (Appellate Court) dated December 5, 2003, affirming the conviction by Broomfield County Court.

There has been no rehearing on this matter and there has not yet been an order granting an extension of time within which to file this Petition. Petitioner has, contemporaneously with the filing of this Petition, also filed a Motion to Permit Late Filing of a Petition for *Writ of Certiorari* for the reasons set forth in that Motion.

STATEMENT OF THE CASE

This is an appeal of the conviction of the Petitioner in the Broomfield County Court of Driving Under the Influence of Alcohol, C.R.S. § 42-4-1301, as amended, after jury trial, and orders entered in that case by the trial court, and the subsequent appeal of the district court for the 17th Judicial District affirming the conviction of the Petitioner and affirming the orders of the trial court. Petitioner was charged with driving under the influence and failure to drive in a single lane, both pursuant to a *Summons and Complaint* issued by the Broomfield Police on July 17, 2002.

The case was tried in the County Court of Broomfield before The Honorable Randall J. Davis to a jury of six on January 6, 2003. The Petitioner was acquitted of the charge of failure to drive in a single lane but convicted of driving under the influence of alcohol. The date of entry of conviction was the date of sentencing, March 5, 2003.

Petitioner timely filed his *Notice of Appeal* with the district court after obtaining an extension of time by proper and timely motion for extension of time to file the *Notice of Appeal*.

The sentence imposed on the Petitioner was as follows: thirty days in jail; a fine, costs and statutory surcharges in the

total amount of $1,549.00; sixty hours of useful community service; and compliance with the recommendations of the Probation Department, including completion of a Track D Education and Therapy Program, and engagement in monitored sobriety.

ARGUMENT

I. The Trial Court erred when it refused Petitioner's written plea of not guilty and waiver of advisement of rights under Colo.R.Crim.P. 5, thereby violating Petitioner's right to a speedy trial, and the District Court erred in affirming this ruling.

As a matter of law, the trial court erred when it did not accept the Petitioner's written plea of not guilty and waiver of advisement of rights, thereby violating Petitioner's right to a speedy trial and the district court erred in affirming the ruling of the trial court.

A defendant is not precluded from asserting his Constitutional right to a speedy trial simply because trial was held within the required six month period.[1] The circumstances of each case must be examined to determine whether a speedy trial has been afforded.[2] In making this determination the court must consider the length of the pretrial delay, the reasons for it, whether the defendant has demanded a speedy trial, and

---

[1] *Gelfand v. People*, 196 Colo. 487, 586 P.2d 1331 (1978).

[2] *Id., citing Medina v. People*, 154 Colo. 4, 387 P.2d 733 (1963).

whether any prejudice actually resulted to the defendant.[3] None of those four factors is indispensable to a finding that speedy trial has been denied. Nor is any one of them *ipso facto* sufficient to require such a finding. Rather all are interrelated and must be considered together with any other relevant circumstances.[4]

In this case, the trial court did not accept Petitioner's initial plea of not guilty, submitted on July 30, 2002 in his *Entry of Appearance, Plea of Not Guilty and Demand for Jury Trial.* After the initial plea was refused, Petitioner was informed by the trial court judge that he does not accept pleas until a pretrial conference is held. The pretrial conference in this case was held on September 10, 2002, at which time Petitioner's plea of not guilty was entered. In other words, Petitioner suffered a 42 day delay in entry of his initial plea. The trial court's arbitrary determination of delaying Petitioner's entry of his initial plea of not guilty directly affects Petitioner's Constitutional and statutory rights to a speedy trial. This is an issue of Constitutional, and thus, statewide, concern.

This Court has held that "the practice of the trial judge in postponing arraignment until all pretrial matters are concluded thwarts the purpose of [C.R.S.] section 18-1-405 [*sic*] and [Colo.R.] Crim.P. 48(b) and should not be followed."[5]

---

[3] *Id., citing Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

[4] *Id.*

[5] *People v. Chavez*, 779 P.2d 375, 378 (Colo. 1989).

The trial judge here postponed arraignment for forty-two days, until a pretrial conference was held. These actions were not taken at the instance of the Petitioner. Instead, they were mandated by the trial court's own procedure peculiar to this trial court.

Trial was held on January 6, 2003, one hundred sixty days after Petitioner's initial attempt to enter a plea. The reason for that delay, a pretrial conference, is not even required in a criminal proceeding and should not be a prerequisite to the scheduling of a trial date.[6] Had the trial court accepted Petitioner's plea on July 30, 2002 when it was first tendered, the Petitioner would not have been held in a state of limbo for forty-two days waiting for a court date to be set, thus saving Petitioner the anxiety and unfair prejudice of waiting for a trial unnecessarily postponed due to the policies of the trial court judge.[7] Petitioner asserts that this practice could and did adversely affect his right to a speedy trial.

II. The Trial Court erred when it denied Petitioner's Motion to Set Aside Verdict or for Judgment of Acquittal, and the District Court erred in affirming this ruling.

---

[6] *Tongish v. Arapahoe County Court*, 775 P.2d 63 (Colo. App. 1989).

[7] "Prejudice . . . must be defined in the light of the interests the speedy trial right was designed to assure defendants. These include . . . avoiding subjecting the accused to unnecessary anxiety." *Gelfand v. People*, 196 Colo. 487. 586 P.2d 1331 (1978), *citing Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

As a matter of law, the trial court erred when it did not grant Petitioner's *Motion to Set Aside Verdict or for Judgment of Acquittal* on March 5, 2003. Both the prosecution and the defense agreed at trial that the single issue for jury consideration in the case was whether Petitioner drove his vehicle on the evening of July 18, 2002. Petitioner contested no other elements of the charged offenses. No testimony was presented at trial which placed Petitioner physically behind the wheel of his automobile or that indicated he drove his automobile on the night of June 18, 2002. Petitioner asserts that where a jury finds a defendant not guilty, *and thus not driving*, for purposes of one charged offense, and simultaneously finds a defendant guilty, *and thus driving*, for purposes of a second charged offense, there is only one conclusion; that there is not sufficient evidence in the record from which the jury could find that the defendant was driving beyond a reasonable doubt and beyond every reasonable hypothesis of innocence.[8] The trial court should have set aside the jury's verdict.

Petitioner's counsel twice moved the trial court for acquittal, pursuant to Colo.R.Crim.P. 29, based on lack of evidence identifying Petitioner as the driver of his vehicle. Both motions were denied by the trial court. To withstand a motion of acquittal, the prosecution has the burden of establishing a *prima facie* case of guilt and must introduce sufficient evidence to establish guilt beyond a reasonable

---

[8] *People v. Naranjo*, 181 Colo. 273, 509 P.2d 1235 (1973).

doubt.[9] The Prosecutor was unable to bring forward at trial a single witness who either saw Petitioner driving his vehicle or could place Petitioner inside his vehicle, and thus did not establish a *prima facie* case of guilt against the Petitioner. The trial court's denial of acquittal at trial was reversible error based on the lack of identity evidence.

III. The Trial Court erred when it rejected Petitioner's tendered Jury Instruction on identification, and the District Court erred in affirming this ruling.

As a matter of law, the trial court erred when it refused to submit Petitioner's tendered Jury Instruction on identification to the jury. At trial, counsel for Petitioner tendered a proposed jury instruction which read,

> Identification of the defendant as driving at the time and date of the alleged offense is an essential element to be proved beyond a reasonable doubt by the People. If you find that the identification evidence in this case does not inculpate defendant as the driver of the defendant's vehicle beyond a reasonable doubt, then your verdict must be not guilty.

This instruction was a paraphrase of the language in *Cokley v.*

---

[9] *People v. Bennett*, 183 Colo. 125, 515, P.2d 466 (1973), *citing Corbett v. People*, 153 Colo. 457, 387 P.2d 409 (1963).

People, citing Ortega v. People.[10] Although the trial court conceded the Petitioner's tendered jury instruction was a correct statement of the law, it refused to include this tendered jury instruction. This refusal by the trial court caused undue prejudice to Petitioner.

Importantly, the proposed identification jury instruction was a correct statement of the law as iterated in *Cokley*. The proposed instruction was also concise and clear and not redundant guidance for the jury, instructing that identification of Petitioner as the driver of the Higgs's vehicle was the essential predicate to any further deliberation on the guilt or innocence of Petitioner regarding the charged offenses.

An instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory.[11] Colorado has never held that the jury instructions setting forth the elements of the offense and the burden of proof, standing alone, can encompass, embody, or take the place of a defendant's theory of the case.[12] In *Denver Tramway* this Court said,

> There is no question concerning the defendant's right to have the jury properly instructed in a concrete manner upon its theory of the case. . .

---

[10] *Cokley v. People*, 168 Colo. 52, 449 P.2d 824 (1969), *citing Ortega v. People*, 161 Colo. 463, 423 P.2d 21.

[11] *People v. Hennion*, 923 P.2d 256 (Colo. App. 1996).

[12] *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

> . The defendant is entitled to such instructions . . . . unless the court can see that no prejudicial error resulted from such refusal.[13]

Petitioner's instruction on identification did not simply restate what was already encompassed in the instructions on the elements of the specific charges, but it was instead absolutely necessary to instruct the jury in a concrete manner on Petitioner's theory of the case – that he could not be identified beyond a reasonable doubt as the driver of his vehicle. The failure of the trial court to allow the tendered instruction was a violation of Petitioner's right to a fair trial, which again is a matter of statewide concern as it affects a Constitutional right of Petitioner and all other similarly situated persons defending against criminal charges.

IV. The Trial Court erred by not declaring a mistrial based on the improper argument by the People during closing arguments of facts not in evidence, and the District Court erred in affirming this ruling.

As a matter of law, the trial court erred by not declaring a mistrial based on the Prosecutor's improper argument of facts not in evidence during closing arguments. The Prosecutor's closing arguments included a prejudicial statement of fact not presented at trial when she stated that " [Mrs. Higgs] never told anybody once that she was the driver, not the next day, not a week after, not two weeks after." There was no evidence whatsoever presented at trial regarding any conversations

---

[13] *Denver Tramway Co. v. Doyle*, 63 Colo. 500, 167 P.777 (1917), *quoted in Behr v. McCoy*, 138 Colo. 137, 330 P.2d 535 (1958).

between Mrs. Higgs and any other person which would in any way give a good faith factual basis for the clearly erroneous statement made by the Prosecutor. This was plain error.

The Prosecutor's closing arguments exceeded the limits of proper advocacy on her part by arguing alleged facts not in evidence and undermined the fundamental fairness of the trial, implicating the due process rights of Petitioner. This constitutes plain error. Due process will not permit a Prosecutor to use her closing argument to testify by mentioning facts not in evidence to support a finding of guilt.[14] Further, the trial court should have addressed, but did not, the Prosecutor's improper argument by making absolutely clear to the jury, prior to deliberation, that the improper comments of the Prosecutor were not evidence and could not be considered by the jury in reaching its verdict.[15] The trial court's silence was plain error resulting in undue prejudice to Petitioner.

Because the trial court did not declare a mistrial after closing arguments based on prosecutorial misconduct, thereby allowing the jury to deliberate with inappropriate and misleading impressions regarding the nature and scope of the evidence before it, Petitioner was wrongfully and unfairly prejudiced and deprived of a fair trial. The failure of the trial court to declare a mistrial affects Petitioner's right to a fair trial. Again, this is a Constitutional issue and is therefore an issue of statewide concern.

---

[14] *United States v. Ainesworth*, 716 F.2d 769 (10th Cir. 1983).

[15] *See People v. Sexton*, 192 Colo. 81, 555 P.2d 1151 (1976).

Finally, the district court on appeal upheld the rulings of the trial court. The district court's affirmation of the trial court's rulings on the issues appealed was error and require reversal by this Court.

Petitioner requests that this Court issue a Writ of Certiorari allowing Petitioner to proceed with appeal of all issues set forth herein and those issues reasonably encompassed within the stated issues.

Dated this 8th day of January, 2004.

CRAIG D. JOHNSON & ASSOCIATES, P.C.

s/ Craig D. Johnson
Craig D. Johnson, #11902
Attorney for Petitioner

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 9th day of January, 2004, I have deposited a true and correct copy of the above and foregoing **PETITION FOR WRIT OF CERTIORARI** was hand delivered to the following:

Robert S. Grant
District Attorney, 17th Judicial District
450 South 4th Avenue
Brighton, Colorado 80601

Broomfield County District Court
17 Descombes Drive
Broomfield, Colorado 80020

Broomfield County Court
17 Descombes Drive
Broomfield, Colorado 80020

s/_____

APPENDIX "A"

ORDERS AND OTHER PLEADINGS:

1. Petitioner's Motion to Set Aside Verdict, or in the Alternative, Motion for New Trial filed February 28, 2003.

2. Order and Judgment dated March 5, 2003, Broomfield County Court.

3. Mittimus dated March 5, 2003, Broomfield County Court.

4. Order dated December 5, 2003, District Court.

STATUTES

1. C.R.S. §13-6-310.

2. C.R.S. §42-4-1301.

COUNTY COURT, BROOMFIELD COUNTY, COLORADO
Case No. 02T712
Court Address: 17 Descombes Drive, Broomfield, Colorado 80020
Phone Number : 303-438-6365

Plaintiff:
PEOPLE OF THE STATE OF COLORADO

Defendant:
JEFF ARNOLD HIGGS

Attorney:
Craig D. Johnson & Associates, P.CC.
Craig D. Johnson, #11902
Susan M. Spaulding, #30068
8 Garden Center
Broomfield, CO 80020
Phone: 303-466-2335
Fax: 303-466-6342
E-mail: cdj@lawyer.com

MOTION TO SET ASIDE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Defendant, by and through his attorneys, Craig D. Johnson & Associates, P.C. renews his motion for acquittal to this Court, pursuant to C.R.Crim.P. 29(c), and moves for an Order setting aside the verdict rendered in this case on January 6, 2003, or in the alternative, pursuant to

C.R.Crim.P. 33, for an Order for a new trial, and as grounds therefor states:

1. This action involves an alleged driving under the influence offense that occurred in the City and County of Broomfield, State of Colorado on July 18, 2002.

2. Trial to a jury was held before this Court on January 6, 2003 on two charges,

Driving a Vehicle Under the Influence of Alcohol and Failure to Drive in a Single Lane.

3. After presentation of all the evidence, the jury found the Defendant not guilty on the charge of Failure to Drive in a Single Lane and guilty on the charge of Driving a Vehicle Under the Influence of Alcohol. This result is totally inconsistent with any reasonable conclusion drawn from the evidence and the jury's verdict should be set aside and a judgment of acquittal must be entered in favor of the Defendant.

4. The defense stipulated that the Defendant had a blood alcohol level of .224 on the evening of July 18, 2002.

5. Further, and most importantly to the merits of this motion, the prosecution and defense agreed on the record at trial that the only issue for jury consideration was whether or not it was the Defendant who was driving his vehicle on the evening of July 18. *See* T.Ct.R. p.6, lines 2-10; p. 20, lines 9-14 and lines 18-21. Essentially, this meant that the jury did not have to decide the other elements of each offense with which the Defendant was charged, because all other elements of each offense were not being contested by Defendant.

6. The only witness who testified that he saw the Defendant's vehicle weaving in and out of its traffic lane was Zachary White. Mr. White testified that his attention was first called toward Defendant's vehicle when he noticed the vehicle "swerving into the southbound lanes of Lowell Boulevard at 136th at approximately 10:22 p.m. on July 18, 2002. .". Mr. White then testified that the vehicle "swerved back into the . . . northbound lanes . . . [a]nd . . . turned westbound onto 136th, [where] he nearly hit several street signs, so that's when I decided to call [the police]." *See* T.Ct.R. p. 89, lines 6-7 and lines 16-18. This evidence was not rebutted or refuted by Defendant whatsoever. Therefore, one can only come to the reasonable conclusion that when the jury found Defendant not guilty of the offense of Failure to Drive in a Single Lane, they concluded that the only element they had to determine as the trier of fact; i.e. whether Defendant was or was not driving, that Defendant was not driving.

7. The jury clearly did not find Mr. White's testimony regarding his observations on the night of July 19, 2002 to be credible, because it found the Defendant not guilty of Failure to Drive in a Single Lane. It is impossible to swerve back and forth between the northbound and southbound lanes of a road, or to nearly hit several street signs, as described by Mr. White, without driving out of a single lane.

8. It should be noted that the defense put on three witnesses, the Defendant, his wife, Janet Higgs, and Bruce Goldberg, all three of whom testified that the Defendant did not drive his vehicle on the evening of July 18, 2002. Also, there is no evidence presented which showed that Defendant

was, in fact, driving on the date of the alleged offense. Although the jury, as trier of fact, has the right to believe or disbelieve all or a portion of witness testimony, a reasonable person sitting as trier of fact cannot find Defendant was not driving for the purpose of one offense, yet driving for the purpose of another offense, especially when the evidence is uncontroverted as to the guilt of the Defendant, if he was found to be driving, with respect to the offense on which he was found not guilty.

9. The only issue the jury had to determine in this case was whether the Defendant was driving his vehicle on the evening of July 18, 2002. The test for evaluating a motion for acquittal where the Defendant's guilt is proven by circumstantial evidence, is whether there is evidence in the record from which a jury can find beyond a reasonable doubt that the circumstances are such as to include every reasonable hypothesis of innocence. *People v. Naranjo*, 181 Colo. 273, 509 P.2d 1235 (1973). Given the unique circumstances of the case at bar and the narrow contested issue in this trial, no reasonable trier of fact could conclude Defendant was not guilty, and thus not driving, on one charge, yet find Defendant guilty, and therefore driving, on another charge.

10. The defense twice during the trial moved for acquittal based on insufficient evidence identifying the Defendant as the driver of his vehicle. Both motions were denied by the Court. *See* T.Ct.R. p. 163, line 11 - p. 165, line 23; p. 238, line 16 - p. 239, line 4.

11. Pursuant to C.R.Crim.P. 29(c), and based on the evidence before the Court, the Defendant now renews his

motion for acquittal and moves this Court for an Order setting aside the verdict rendered by the jury in this case on January 6, 2003.

12. In the alternative, pursuant to C.R.Crim.P. 33, Defendant now moves for a new trial.

13. Defendant asserts that the jury in this trial was either confused or disregarded the instructions it was required to follow. Defendant tendered a proposed jury instruction to the Court which read,

> "Identification of the defendant as driving at the time and date of the alleged offense is an essential element to be proved beyond a reasonable doubt by the People. If you find that the identification evidence in this case does not inculpate defendant as the driver of the defendant's vehicle beyond a reasonable doubt, then your verdict must be not guilty." The inclusion of the tendered instruction by the defense was denied by the Court and counsel for the defense objected at the time. *See* T.Ct.R. p. 123, lines 11-18.

14. The proposed jury instruction was a correct statement of the law and it correctly instructed the jury as to the narrow issue the jury had to determine at trial The Trial Court's failure to instruct the jury using Defendant's tendered instruction was error. This error caused Defendant undue prejudice and the error was not harmless error.

15. Defendant asserts that based on the evidence and narrow issue that was to be decided by the jury at trial, it was reversible error for the Court to deny Defendant's jury instruction regarding identification of the Defendant and to

deny Defendant's two motions for acquittal made at trial.

16. The purpose of filing this motion to set aside the jury's verdict or for a new trial is to allow this Court a chance to correct its errors. *Losavio v. District Court, 182 Colo. 186, 512 P. 2d 264 (1973).* In the case at bar, not only has this Court made reversible error by not instructing the jury with the tendered instruction, but the combination of lack of that instruction and viewing the evidence in the light most favorable to the People, Defendant repeats that the jury's verdicts are not reasonable and are totally at odds with the evidence in this case. Defendant asserts that it would be an abuse of discretion by this Court if it denies this motion. *People v. Jones, 942 P.2d 1258 (Colo. App. 1996).*

17. For all the reasons above and in the best interests of justice, the relief sought herein must be granted.

Dated: February 28, 2003

CRAIG. D. JOHNSON & ASSOCIATES, P.C.

s/ Mardi Moore #28766 for
Craig D. Johnson, #11902
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of February, 2003, I have deposited a true and correct copy of the above and foregoing **MOTION TO SET ASIDE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL** in the U.S. Mail, postage prepaid, addressed to:

Office of the City Attorney
City of Broomfield
One DesCombes Drive
Broomfield, CO 80028-1415

s/ Lynne Gallagher

County Court, Broomfield County, State of Colorado
Case #: C0802002T 000712 Div/Room: 1

JUDGMENT OF CONVICTION, SENTENCE Original

The People of Colorado vs. HIGGS, JEFF ARNOLD
DOB 10/04/1954 SID

The Defendant was sentenced on: 3/05/2003
People represented by...: BECK, LORI
Defendant represented by: JOHNSON, CRAIG
UPON DEFENDANT'S CONVICTION this date of: 1/6/2003
The defendant pled guilty to:
Count # 1 Charge: Driving Under the Influence
C.R.S. # 42-4-1301(1)(a) Class: M
Date of offense(s): 7/18/2002 to 7/18/2002 Date of finding(s): 1/06/2003

IT IS THE JUDGMENT/SENTENCE OF THIS COURT that the defendant be sentenced to

Probation Alcohol Supervisio	2.00 YEARS	COUNT 1
Jail	30.00 DAYS	COUNT 1

JAIL SENTENCE TO BE SERVED AS CONSECUTIVE WEEKENDS, FRI-SUN AT 8:30 PM
TO START APRIL 11, 2003 NO LATER THAN 8:30 P.M.
/DMC

Assessed	Balance
$1,549.00	$1,549.00

-52a-

ADDITIONAL REQUIREMENTS

Complete 60.00 hours of Useful Public Service
CONSECUTIVE WEEKENDS

JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:
DATE: 3/5/03 NPT_____ JUDGE/MAGISTRATE_____

s/ Randall J. Davis
RANDALL JOSEPH DAVIS

CERTIFICATE OF SHERIFF

I CERTIFY THAT I EXECUTED THIS ORDER AS DIRECTED

DATE_____ SHERIFF_____
BY DEPUTY_____

FILED IN BROOMFIELD COUNTY COMBINED COURT
MARCH 05, 2003
Case Number 02T712 Div. 1 ID Number_____

THE PEOPLE OF THE STATE OF COLORADO

vs.

JEFF ARNOLD HIGGS, DEFENDANT
CONDITIONS OF PROBATION/SENTENCE, FOR THE OFFENSE(S) OF: DUI

__xx__ You are hereby sentenced to a term of probation for a period of 24 __xx__ months/years.
_____ Probation reinstated
and shall comply with the following conditions and those listed in Section (A)(B) on the reverse side of this form. You may be supervised in specialized programs, ad determined by the Probation Department, with additional conditions imposed.
__xx__ YOU ARE ORDERED TO REPORT IMMEDIATELY TO THE:
__xx__ CLERKS OFFICE __xx__ PROBATION DEPT.
____ ALCOHOL UNIT ____ INTERVENTION ____ RMOMS
_____ You are hereby sentenced to a term of unsupervised probation for a period of _____ Months. You need not report to any probation office, as your case will be reviewed by the Court.
As a condition of your sentence, you shall pay:
TOTAL FINES & COSTS: $1,000 + $349 + 200
payable to: CLERK OF THE COMBINED COURT

****IF YOU ARE IN CUSTODY, YOU MUST APPEAR WITHIN 48 HOURS OF YOUR RELEASE FROM JAIL****

_____ A supervision fee of $35 per month is to be paid directly to INTERVENTION.

CONDITIONS OF PROBATION/SENTENCE:

You shall participate in, cooperate with, pay any fees required, and successfully complete the following:

___ 1. Substance abuse evaluation/treatment
___ 2. Mental health evaluation/counseling or treatment
___ 3. a. Domestic violence evaluation
b. Domestic Violence counseling
xx 4. Useful Public Service of 60 hours to be completed by _____.
___ 5. Level I alcohol education.
xx 6. Level II alcohol education BAC .224 PRIORS 2
xx 7. Level II alcohol therapy 86 hours
___ 8. Intensive outpatient substance abuse treatment
___ 9. Aftercare_____ as required by treatment/probation
xx 10. Monitored sobriety required by treatment/probation
Antabuse (Circled)
Urine screens (Circled)
Breath screens (Circled) (circle)

Track D on weekends Friday 8:30 a.m. to Sunday 8:30 p.m. (Handwritten on document)

___ 11. MADD Victim Impact panel
xx 12. Jail for 30 days suspended to 30 days beginning on 4/11/03 at 8:30 p.m.
_____ Work release _____ Treatment release
Type: _____
_____ Electronic Monitoring for ___ Day(s)
on/before_____

___ 13. Get alcohol evaluation and treatment as recommended.

___ 14. Other:

___ No contact order vacated ___ No contact order continues for term of supervision

I have received a copy of these conditions and have read them carefully with full understanding. I understand that if I violate these conditions or those listed on the reverse of this form, I may be brought before the Court for revocation and imposition of sentence.

JUDGE: Randal J. Davis Date 3/5/03

Defendant: Jeff Higgs Date

Address City Zip

Phone (home) (work) Social Security Number

DISTRICT COURT, BROOMFIELD COUNTY, COLORADO
Case No. 2003CV68, Div: A, Ctrm: 2
Court Address: 17 Descombes Drive, Broomfield, CO 80020

JEFF ARNOLD HIGGS
Appellant,

v.

PEOPLE OF THE STATE OF COLORADO
Appellee.

ORDER

This is an appeal from the County Court for Broomfield County. The court has received and reviewed the certified record from the County court and the briefs of the parties. The Court now dispenses with oral argument and rules on the appeal as stated herein.

On July 17, 2002, the appellant was charged with driving under the influence and failure to drive in a single lane. The case was tried before the Honorable Randall J. Davis and a jury of six on January 6, 2003. Appellant was acquitted of the charge of failure to drive in a single lane and convicted of driving under the influence. The defendant raises the following issues for appellate review: (1) Has appellant's constitutional right to a speedy trial been violated; (2) Did the trial court err when it denied appellant's motion

for judgment of acquittal; (3) Did the trial court err when it rejected appellant's tendered jury instruction on Identification; (4) Did the trial court err by not granting a mistrial based on statements made during the prosecution's closing arguments.

I. Speedy trial

Appellant asserts a violation of his constitutional right to a speedy trial. The appellant has not asserted a statutory right to a speedy trial under C.R.S. 18-4-104, as the record reflects that a trial was held within one-hundred and eighty days from the initial plea of not guilty. In fact, the trial was held less than six months after the date of the offense. Defendant bases his denial of his right to speedy trial on a forty-two day delay between the time he first offered a not guilty plea to the date the court accepted the plea.

The constitutional right to a speedy trial, derived from U.S Const. Amend. 6, and Colo. Const. art. II. § 16, is distinct from the statutory speedy trial right and the determination as to one does not necessarily dispose of the other. People v. Hogland, 543 P.2d 1298 (1975).

The defendant carries the burden of proving a violation of a right to a speedy trial. People v. Velasquez, 641 P.2d 943 (Colo. 1982). Whether a defendant's speedy trial right has been violated is determined by a balancing of four factors: the length of the delay; the reason for the delay; the defendant's assertion of his right to a speedy trial; and the prejudice to the defendant. Barker v. Wingo, 407 U.S. 514

(1972). The purpose of the balancing analysis is to protect the defendant from undue prejudice. Prejudice may include, *inter alia,* the impact of the delay upon the ability to present a defense, upon the availability of evidence, and upon the cost of the proceedings. People v. Harris, 914 P.2d 425 (Colo. App. 1995). Where the period intervening between the initial filing of the criminal complaint and trial was neither excessive nor unjustified, and where the defendant failed to establish that his defense was in any manner prejudiced, the defendant was not denied constitutional right to speedy trial. People v. Velasquez, 641 P.2d 943 (1982).

The appellant has not made any showing of facts sufficient to establish that the forty-two day delay to set his case for trial, adversely impacted his ability to present a defense. He has not demonstrated that any evidence became unavailable, or that the delay caused him to incur additional costs. Rather, the appellant asserts a violation of his speedy trial right from the anxiety caused by being forced to wait an extra forty-two days to set a trial date. The appellant's anxiety is unfortunate, but the delay must operate as a prejudice, and thus, the appellant's anxiety is a non-consequence. The appellant has failed to establish that his defense to the charges was in any manner prejudiced by the period intervening between the filing of the complaint and the trial date.

II. Motion for Judgment of Acquittal

Appellant asserts that the trial court improperly denied his motion for judgment of acquittal. Specifically, Appellant contends there was insufficient evidence to find guilt beyond reasonable doubt.

Upon a defendant's motion for judgment of acquittal, the prosecution is given the benefit of every reasonable inference which might be fairly drawn from the evidence. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996). The proper standard to be applied to a defendant's motion for acquittal is whether the relevant admissible evidence, both direct and circumstantial, when viewed in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. People v. Gonzales, 666 P.2d 123 (Colo. 1983) (emphasis added). Finally, a court properly denies a defendant's motion for judgment of acquittal at the conclusion of all of the evidence where the question of credibility of the witnesses and the ultimate guilt of defendant remain, for such matters are for the jury's determination. Roybal v. People, 493 P.2d 9 (1972).

The record reflects that the only issue with regard to the driving under the influence charge was whether the appellant was driving his vehicle on the night in question. At trial, defendant offered evidence that his wife was driving the vehicle and he was a passenger. However, a witness testified that a male with short black hair was driving the appellant's vehicle on the night in question. The vehicle was later parked in appellant's garage, with one person seated in the driver's seat. Moments later the appellant was standing behind the vehicle.

This testimony gives rise to a reasonable inference that appellant drove the vehicle home. The court finds that the record contains ample, circumstantial evidence to permit the jury to conclude that the appellant committed the offense of driving under the influence. Therefore, the trial court correctly reserved the issue of ultimate guilt for the jury's

determination.

Defendant also argues that since the jury found defendant not guilty of failure to drive in a single lane the verdicts in the case are inconsistent. He argues the jury had found he was not driving for one count and was driving for the other. This argument is unpersuasive as there is no reason for this court to conclude that the jury's verdict of not guilty on the driving in a single lane was based on the identity of driver.

For the reasons stated herein, the court concludes the county court did not err in denying appellant's motion for judgment of acquittal.

III. Jury Instructions

The appellant also contends that the trial court erred when it refused to tender his jury instruction. If a tendered instruction sets forth a theory of the case which amounts to nothing more than a general denial of the act, or if the instruction is *already encompassed in other instructions*, the defendant is not entitled to have his theory of the case reiterated in a separate instruction. People v. Young, 710 P.2d 1140 (Colo. App. 1985) (emphasis added).

In the present case, the appellant tendered an instruction to the court which explained to the jury the issue of identification. However, the court had already provided instructions including the elements of the crime that must be proven. These elements were in instruction number nine and included an instruction that it was necessary to determine that the defendant drove the vehicle. Therefore, the trial court did not err for refusing to tender the appellant's duplicate instruction to the jury.

IV. Closing Arguments

The appellant also contends that the trial court erred by not granting a mistrial based on statements made during the prosecutor's closing argument.

When an alleged error consists of prosecutorial misconduct and was not preserved by a contemporaneous objection, it will not be considered on appeal unless it was plain error affecting the substantial rights of the defendant. Taylor v. People, 723 P.2d 131 (1986). The determination whether closing argument is improper is a matter committed to the discretion of the trial court. People v. Shepherd, 43 P.3d 693 (Colo. App. 2001).

The record indicates that the appellant did not make an objection to the prosecutor's statements during closing arguments. Therefore, the only issue for the court's consideration is whether it was plain error when the trial court, *sua sponte,* did not declare a mistrial.

The court recognizes that our system of justice cannot tolerate verdicts based on bias and prejudice rather than on relevant facts and applicable law. However, given the trial court's broad discretion, the record reveals that the statements made by the prosecutor did not amount to such a level as to constitute plain error within the meaning of Crim. P. 52(b).

For the reasons stated herein, the conviction of appellant in the county court is affirmed.

Dated at Broomfield, Colorado this 5th day of December, 2003.

By the court:

s/ Donald W. Marshall, Jr.
Donald W. Marshall, Jr.

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via JusticeLink (e-file) to all counsel of record and mailed by the Court to all pro se parties this 5th day of December, 2003.

s/_____
Division Clerk

CO ST § 13-6-310 C.R.S.A. § 13-6-310

WEST'S COLORADO REVISED STATUTES
ANNOTATED TITLE 13. COURTS AND COURT PROCEDURE COURTS OF RECORD
ARTICLE 6. COUNTY COURTS
PART 3. GENERAL PROCEDURAL PROVISIONS §13-6-310. Appeals from county court

(1) Appeals from final judgments and decrees of the county courts shall be taken to the district court for the judicial district in which the county court entering such judgment is located. Appeals shall be based upon the record made in the county court.

(2) The district court shall review the case on the record on appeal and affirm, reverse, remand, or modify the judgment; except that the district court, in its discretion, may remand the case for a new trial with such instructions as it may deem necessary, or it may direct that the case be tried de novo before the district court.

(3) Repealed by Laws 1985, HB.1074, § 12.

(4) Further appeal to the supreme court from a determination of the district court in a matter appealed to such court from the county court may be made only upon writ of certiorari issued in the discretion of the supreme court and pursuant to such rules as that court may promulgate.

CREDIT(S)

Amended by Laws 1985, H.B.I074, §§ 5,12.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1997 Main Volume
The 1985 amendment repealed subsec. (3), which read "In counties in which a superior court has been established, appeals from the county court shall be taken to the superior court rather than the district court. All of the provisions of articles 13 to 18 of this chapter governing appeals from the county court to the district courts are applicable when the appeal is taken to the superior court pursuant to this subsection

CO ST § 42-4-1301 C.R.SA. § 42-4-1301
WEST'S COLORADO REVISED STATUTES
ANNOTATED TITLE 42. VEHICLES AND TRAFFIC
REGULATION OF VEHICLES AND TRAFFIC
ARTICLE 4. REGULATION OF VEHICLES AND
TRAFFIC~ PART 13. ALCOHOL AND DRUG OFFENSES

§42-4-1301. Driving under the influence–driving while impaired–driving with excessive alcoholic content–penalties

(1)(a) It is a misdemeanor for any person who is under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, to drive any vehicle in this state.

(b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive any vehicle in this state.

(c) It is a misdemeanor for any person who is an habitual user of any controlled substance defined in section 12-22-303(7) C.R.S., to drive any vehicle in this state.

(d) For the purposes of this subsection (1), one or more drugs shall mean all substances defined as a drug in section 12-22-303(13). C.R.S., and all controlled substances defined in section 12-22-303(7), C.R.S., and glue- sniffing, aerosol inhalation, and the inhalation of any other toxic vapor or vapors.

(e) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state, including, but not limited to, the medical use of marijuana pursuant to section 18-18-406.3, C.RS. shall not constitute a defense against any charge of violating this subsection (1).

(f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which

alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(h) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI, it shall be sufficient to describe the offense charged as "drove a vehicle under the influence of alcohol or drugs or both".

(i) Pursuant to section 16-2-106, C.R.S., in charging the offense of DW AI, it shall be sufficient to describe the offense charged as "drove a vehicle while impaired by alcohol or drugs or both",

(2)(a) It is a misdemeanor for any person to drive any vehicle in this state when the person's BAC is 0.10 or more at the time of driving or within two hours after driving. During a trial, if the state's evidence raises the issue, or if a defendant presents some credible evidence, that the defendant consumed alcohol between the time that the defendant stopped driving and the time that testing occurred, such issue shall be an affirmative defense, and the prosecution must establish beyond a reasonable doubt that the minimum 0.10 blood or breath alcohol content required in this paragraph (a) was reached as a result of alcohol consumed by the defendant before the defendant stopped driving.

(a.5) It is a class A traffic infraction for any person under twenty-one years of age to drive any vehicle in this state when the person's BAC, as shown by analysis of the person's breath, is at least 0.02 but not more than 0.05 at the time of driving or within two hours after driving.

(b) In any prosecution for the offense of DUI per se, the defendant shall be entitled to offer direct and circumstantial evidence to show that there is a disparity between what the tests show and other facts so that the trier of fact could infer that the tests were in some way defective or inaccurate. Such evidence may include testimony of nonexpert witnesses relating to the absence of any or all of the common symptoms or signs of intoxication for the purpose of impeachment of the accuracy of the analysis of the person's blood or breath.
(c) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI per se, it shall be sufficient to describe the offense charged as "drove a vehicle with excessive alcohol content".

(3) The offenses described in subsections (1) and (2) of this section are strict liability offenses.

(4) No court shall accept a plea of guilty to a non- alcohol-related or non- drug-related traffic offense or guilty to the offense of UDD from a person charged with DUI, DUI per se, DWAI, or habitual user; except that the court may accept a plea of guilty to a non-alcohol-related or non-drug- related traffic offense or to UDD upon a good faith representation by the prosecuting attorney that the attorney could not establish a prima facie case if the defendant were brought to trial on the original alcohol-related or drug-related offense.

(5) Notwithstanding the provisions of section 18-1-408. C.R.S., during a trial of any person accused of both DUI and DUI per se, the court shall not require the prosecution to elect between the two violations. The court or a jury may consider and convict the person of either DUI or DWAI, or DUI per se, or both DUI and DUI per se, or both DWAI and DUI per se. If the person is convicted of

more than one violation, the sentences imposed shall run concurrently.

(6)(a) In any prosecution for DUI or DWAI, the defendant's BAC at the time of the commission of the alleged offense or within a reasonable time thereafter gives rise to the following presumptions or inferences:

(I) If at such time the defendant's BAC was 0.05 or less, it shall be presumed that the defendant was not under the influence of alcohol and that the defendant's ability to operate a vehicle was not impaired by the consumption of alcohol.

(II) If at such time the defendant's BAC was in excess of 0.05 but less than 0.10, such fact gives rise to the permissible inference that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(III) If at such time the defendant's BAC was 0.10 or more, such fact gives rise to the permissible inference that the defendant was under the influence of alcohol.
(b) The limitations of this subsection (6) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or whether or not the defendant's ability to operate a vehicle was impaired by the consumption of alcohol.

(c) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine such person's alcohol or drug level. This paragraph (c) shall not

prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this paragraph (c) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

(d) If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in section 42-4-1301.1 and such person subsequently stands trial for DUI or DWAI, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests.

(e) Involuntary blood test--admissibility. Evidence acquired through an involuntary blood test pursuant to section 42-4-1301.(3) shall be admissible in any prosecution for DUI, DUI per se, DWAI, habitual user, or UDD, and in any prosecution for criminally negligent homicide pursuant to section 18-3-105. C.R.S., vehicular homicide pursuant to section 18-3-106(1)(b). C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S.

(f) Chemical test-admissibility. Strict compliance with the rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results.

(g) It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary

foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(h) In any trial for a violation of this section, the testimony of a law enforcement officer that he or she witnessed the taking of a blood specimen by a person who the law enforcement officer reasonably believed was authorized to withdraw blood specimens shall be sufficient evidence that such person was so authorized, and testimony from the person who obtained the blood specimens concerning such person's authorization to obtain blood specimens shall not be a prerequisite to the admissibility of test results concerning the blood specimens obtained.

(i)(I) Following the lawful contact with a person who has been driving a vehicle, and when a law enforcement officer reasonably suspects that a person was driving a vehicle while under the influence of or while impaired by alcohol, the law enforcement officer may conduct a preliminary screening test using a device approved by the executive director of the department of public health and environment after first advising the driver that the driver may either refuse or agree to provide a sample of the driver's breath for such preliminary test; except that, if the driver is under twenty-one years of age, the law enforcement officer may, after providing such advisement to the person, conduct such preliminary screening test if the officer reasonably suspects that the person has consumed any alcohol.

(II) The results of this preliminary screening test may be used by a law enforcement officer in determining whether probable cause exists to believe such person was driving a vehicle in violation of this section and whether to administer a test pursuant to section 42-4-1301.1(2).
(III) Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in

any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request.

(7) Penalties. (a)(I) Except as otherwise provided in subparagraphs (II) and (IV) of this paragraph (a), every person who is convicted of DUI, DUI per se, or habitual user shall be punished by:

(A) Imprisonment in the county jail for not less than five days nor more than one year, the minimum period of which shall be mandatory except as otherwise provided in section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and

(C) Not less than forty-eight hours nor more than ninety-six hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(II) Upon conviction of a violation described in sub-subparagraph (A) or (B) of subparagraph (III) of this paragraph (a), an offender shall be punished by:

(A) Imprisonment in the county jail for not less than ninety days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to eighty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3, and

(B) In the court's discretion, a fine of not less than five hundred dollars nor more than one thousand five hundred dollars; and

(C) Not less than sixty hours nor more than one hundred

twenty hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(III) Subparagraph (II) of this paragraph (a) shall apply to:

(A) A conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or for vehicular homicide pursuant to section 18-3-106(1)(b)(I), C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b)(I), C.R.S., or of driving while such person's driver's license was under restraint pursuant to section 42-2-138(4)(b); or

(B) A conviction for DUI, DWAI, or DUI per se when the person's BAC was 0.20 or more at the time of driving or within two hours after driving.

(IV) Upon a conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DWAI, an offender shall be punished by:

(A) Imprisonment in the county jail for not less than seventy days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to sixty-three days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than four hundred fifty dollars nor more than one thousand five hundred dollars; and

(C) Not less than fifty-six hours nor more than one hundred twelve hours of useful public service, the performance of the minimum period of service which shall be mandatory, and the court shall have no discretion to suspend the

mandatory minimum period of performance of such service.

(b)(I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (b), every person who is convicted of DWAI shall be punished by:

(A) Imprisonment in the county jail for not less than two days nor more than one hundred eighty days, the minimum period of which shall be mandatory except as provided in section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than one hundred dollars nor more than five hundred dollars; and

(C) Not less than twenty-four hours nor more than forty-eight hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(II) Upon conviction of a second or subsequent offense of DWAI, an offender shall be punished by:

(A) Imprisonment in the county jail for not less than forty-five days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to forty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and

(C) Not less than forty-eight hours nor more than ninety-six hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(III) Upon conviction for DWAI, which violation occurred

at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or vehicular homicide pursuant to section 18-3-106(1)(b)(I), C.R.S., or vehicular assault pursuant to section 18-3- 205(1)(b) (1), C.R.S., or of driving while such person's driver's license was under restraint as described in section 42-2-138(4)(b), an offender shall be punished by:

(A) Imprisonment in the county jail for not less than sixty days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to fifty-four days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than four hundred dollars nor more than one thousand two hundred dollars; and

(C) Not less than fifty-two hours nor more than one hundred four hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(IV) Deleted by Laws 2002, Ch. 342, § 2, eff. July 1, 2002.

(c)(I) For the purposes of paragraphs (a) and (b) of this subsection (7), a person shall be deemed to have a previous conviction for DUI, DUI per se, DWAI, or habitual user, or vehicular homicide pursuant to section 18-3-106(1)(b)(I), C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b) (I), C.R.S., if such person has been convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an act that, if committed within this state, would constitute the offense of DU1, DUI per se, DWAI, or habitual user, or vehicular (II) For sentencing purposes concerning convictions for second and subsequent offenses, prima facie proof of a defendant's previous convictions shall be

established when the prosecuting attorney and the defendant stipulate to the existence of the prior conviction or convictions or the prosecuting attorney presents to the court a copy of the driving record of the defendant provided by the department of revenue of this state, or provided by a similar agency in another state, that contains a reference to such previous conviction or convictions or presents an authenticated copy of the record of the previous conviction or judgment from any court of record of this state or from a court of any other state, the United States, or any territory subject to the jurisdiction of the United States. The court shall not proceed to immediate sentencing when there is not a stipulation to prior convictions or if the prosecution requests an opportunity to obtain a driving record or a copy of a court record. The prosecuting attorney shall not be required to plead or prove any previous convictions at trial, and sentencing concerning convictions for second and subsequent offenses shall be a matter to be determined by the court at sentencing.
(III) As used in this part 13, "convicted" includes a plea of no contest accepted by the court.

(d) In addition to the penalties prescribed in this subsection (7):

APPENDIX G

CO ST § 42-4-1301 C.R.S.A. § 42-4-1301
WEST'S COLORADO REVISED STATUTES ANNOTATED
TITLE 42. VEHICLES AND TRAFFIC
REGULATION OF VEHICLES AND TRAFFIC
ARTICLE 4. REGULATION OF VEHICLES AND TRAFFIC
PART 13. ALCOHOL AND DRUG OFFENSES

§ 42-4-1301. Driving: under the influence--driving while impaired-driving with excessive alcoholic content–penalties

(1)(a) It is a misdemeanor for any person who is under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, to drive any vehicle in this state.

(b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive any vehicle in this state.

(c) It is a misdemeanor for any person who is an habitual user of any controlled substance defined in section 12-22-303(7), C.RS., to drive any vehicle in this state.

(d) For the purposes of this subsection (1), one or more drugs shall mean all substances defined as a drug in section 12-22-303(13), C.R.S., and all controlled substances defined in section 12-22-303(7), C.R.S., and glue sniffing, aerosol inhalation, and the inhalation of any other toxic vapor or vapors.

(e) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state, including, but not limited to, the medical use of marijuana pursuant to section 18-18-406.3, C.R.S., shall not constitute a defense against any charge of violating this subsection (1).

(f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.
(g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(h) Pursuant to section 16-2-106. C.R.S., in charging the offense of DUI, it shall be sufficient to describe the offense charged as "drove a vehicle under the influence of alcohol or drugs or both".

(i) Pursuant to section 16-2-106. C.R.S., in charging the offense of DWAI, it shall be sufficient to describe the offense charged as "drove a vehicle while impaired by alcohol or drugs or both".

(2)(a) It is a misdemeanor for any person to drive any vehicle in this state when the person's BAC is 0.10 or more at the time of driving or within two hours after driving. During a trial, if the state's evidence mises the issue, or if a defendant presents some credible evidence, that the defendant consumed alcohol between the time that the defendant stopped driving and the time that testing occurred, such issue shall be an affirmative defense, and the prosecution must establish beyond a reasonable doubt that the minimum 0.10 blood or breath alcohol content required in this paragraph (a) was reached as a result of

alcohol consumed by the defendant before the defendant stopped driving.

(a.5) It is a class A traffic infraction for any person under twenty-one years of age to drive any vehicle in this state when the person's BAC, as shown by analysis of the person's breath, is at least 0.02 but not more than 0.05 at the time of driving or within two hours after driving.

(b) In any prosecution for the offense of DUI per se, the defendant shall be entitled to offer direct and circumstantial evidence to show that there is a disparity between what the tests show and other facts so that the trier of fact could infer that the tests were in some way defective or inaccurate. Such evidence may include testimony of nonexpert witnesses relating to the absence of any or all of the common symptoms or signs of intoxication for the purpose of impeachment of the accuracy of the analysis of the person's blood or breath.

(c) Pursuant to section 16-2-106, C.RS., in charging the offense of DUI per se, it shall be sufficient to describe the offense charged as "drove a vehicle with excessive alcohol content".

(3) The offenses described in subsections (1) and (2) of this section are strict liability offenses.

(4) No court shall accept a plea of guilty to a non- alcohol-related or non- drug-related traffic offense or guilty to the offense of UDD from a person charged with DUI, DUI per se, DWAI, or habitual user; except that the court may accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or to UDD upon a good faith representation by the prosecuting attorney that the attorney could not establish a prima facie case if the defendant were brought to trial on the original alcohol-related or drug-related offense.

(5) Notwithstanding the provisions of section 18-1-408, C.R.S., during a trial of any person accused of both DUI

and DUI per se, the court shall not require the prosecution to elect between d1e two violations. The court or a jury may consider and convict the person of either DUI or DWAI, or DUI per se, or both DUI and DUI per se, or both DWAI and DUI per se. If the person is convicted of more than one violation, the sentences imposed shall run concurrently.

(6)(a) In any prosecution for DUI or DWAI, the defendant's BAC at the time of the commission of the alleged offense or within a reasonable time thereafter gives rise to the following presumptions or inferences:

(I) If at such time the defendant's BAC was 0.05 or less, it shall be presumed that the defendant was not under the influence of alcohol and that the defendant's ability to operate a vehicle was not impaired by the consumption of alcohol.

(II) If at such time the defendant's BAC was in excess of 0.05 but less than 0.10, such fact gives rise to the permissible inference that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(III) If at such time the defendant's BAC was 0.10 or more, such fact gives rise to the permissible inference that the defendant was under the influence of alcohol.

(b) The limitations of this subsection (6) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or whether or not the defendant's ability to operate a vehicle was impaired by the consumption of alcohol.

(c) In all actions, suits, and judicial proceedings in any court

of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine such person's alcohol or drug level. This paragraph (c) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this paragraph (c) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

(d) If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in section 42-4-1301.1 and such person subsequently stands trial for DUI or DWAI, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests.

(e) Involuntary blood test-admissibility. Evidence acquired through an involuntary blood test pursuant to section 42-4-1301.1(3) shall be admissible in any prosecution for DUI, DUI per se, DWAI, habitual user, or UDD, and in any prosecution for criminally negligent homicide pursuant to section 18-3-105,C.R.S., vehicular homicide pursuant 12 section 18-3-106(1)(b),C.R.S.,assault in the third degree pursuant to section 18-3-204. C.R.S.,or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S.

(t) Chemical test-admissibility. Strict compliance with the rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight

to be given to the test results and not to the admissibility of such test results.

(g) It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(h) In any trial for a violation of this section, the testimony of a law enforcement officer that he or she witnessed the taking of a blood specimen by a person who the law enforcement officer reasonably believed was authorized to withdraw blood specimens shall be sufficient evidence that such person was so authorized, and testimony from the person who obtained the blood specimens concerning such person's authorization to obtain blood specimens shall not be a prerequisite to the admissibility of test results concerning the blood specimens obtained.

(i)(I) Following the lawful contact with a person who has been driving a vehicle, and when a law enforcement officer reasonably suspects that a person was driving a vehicle while under the influence of or while impaired by alcohol, the law enforcement officer may conduct a preliminary screening test using a device approved by the executive director of the department of public health and environment after first advising the driver that the driver may either refuse or agree to provide a sample of the driver's breath for such preliminary test; except that, if the driver is under twenty-one years of age, the law enforcement officer may, after providing such advisement to the person, conduct such preliminary screening test if the officer reasonably suspects that the person has consumed any alcohol.
(II) The results of this preliminary screening test may be

used by a law enforcement officer in determining whether probable cause exists to believe such person was driving a vehicle in violation of this section and whether to administer a test pursuant to section 42-4-1301.1(2).

(III) Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request.

(7) Penalties. (a)(I) Except as otherwise provided in subparagraphs (II) and (IV) of this paragraph (a), every person who is convicted of DUI, DUI per se, or habitual user shall be punished by:

(A) Imprisonment in the county jail for not less than five days nor more than one year, the minimum period of which shall
be mandatory except as otherwise provided in section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and

(C) Not less than forty-eight hours nor more than ninety-six hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(II) Upon conviction of a violation described in sub-subparagraph (A) or (B) of subparagraph (III) of this paragraph (a), an offender shall be punished by:

(A) Imprisonment in the county jail for not less than ninety days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to

eighty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3, and

(B) In the court's discretion, a fine of not less than five hundred dollars nor more than one thousand five hundred dollars; and

(C) Not less than sixty hours nor more than one hundred twenty hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(III) Subparagraph (II) of this paragraph (a) shall apply to:

(A) A conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or for vehicular homicide pursuant to section 18-3-106(1)(b)(I). C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b)(I). C.R.S., or of driving while such person's driver's license was under restraint pursuant to section 42-2- 138(4)(b): or

(B) A conviction for DUI, DWAI, or DUI per se when the person's BAC was 0.20 or more at the time of driving or within two hours after driving.

(IV) Upon a conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DWAI, an offender shall be punished by:

(A) Imprisonment in the county jail for not less than seventy days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to sixty-three days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than four hundred fifty dollars nor more than one thousand five hundred dollars; and

(C) Not less than fifty-six hours nor more than one hundred twelve hours of useful public service, the performance of the minimum period of service which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(b)(I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (b), every person who is convicted of DWAI shall be punished by:

(A) Imprisonment in the county jail for not less than two days nor more than one hundred eighty days, the minimum period of which shall be mandatory except as provided in section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than one hundred dollars nor more than five hundred dollars; and

(C) Not less than twenty-four hours nor more than forty-eight hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(II) Upon conviction of a second or subsequent offense of DWAI, an offender shall be punished by:

(A) Imprisonment in the county jail for not less than forty-five days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to forty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and

(C) Not less than forty-eight hours nor more than ninety-six

hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.
(III) Upon conviction for DWAI, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or vehicular homicide pursuant to section 18- 3-106(1)(b)(I). C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b)(I). C.R.S., or of driving while such person's driver's license was under restraint as described in section 42-2-1 38(4)(b), an offender shall be punished by:

(A) Imprisonment in the county jail for not less than sixty days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to fifty-four days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than four hundred dollars nor more than one thousand two hundred dollars; and

(C) Not less than fifty-two hours nor more than one hundred four hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(IV) Deleted by Laws 2002, Ch. 342, § 2, eff. July 1, 2002.
(c)(I) For the purposes of paragraphs (a) and (b) of this subsection (7), a person shall be deemed to have a previous conviction for DUI, DUI per se, DWAI, or habitual user, or vehicular homicide pursuant to section 18-3-106(1)(b)(I). C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b) (I), C.R.S., if such person has been convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an act that, if committed within this state, would constitute the offense of DUI, DUI per se, DWAI, or habitual user, or vehicular homicide pursuant to section 18-3-106(1)(b)(I), C.R.S., or vehicular assault pursuant to section 18-3-

(II) For sentencing purposes concerning convictions for second and subsequent offenses, prima facie proof of a defendant's previous convictions shall be established when the prosecuting attorney and the defendant stipulate to the existence of the prior conviction or convictions or the prosecuting attorney presents to the court a copy of the driving record of the defendant provided by the department of revenue of this state, or provided by a similar agency in another state, that contains a reference to such previous conviction or convictions or presents an authenticated copy of the record of the previous conviction or judgment from any court of record of this state or from a court of any other state, the United States, or any territory subject to the jurisdiction of the United States. The court shall not proceed to immediate sentencing when there is not a stipulation to prior convictions or if the prosecution requests an opportunity to obtain a driving record or a copy of a court record. The prosecuting attorney shall not be required to plead or prove any previous convictions at trial, and sentencing concerning convictions for second and subsequent offenses shall be a matter to be determined by the court at sentencing.

(III) As used in this part 13, "convicted" includes a plea of no contest accepted by the court.

(d) In addition to the penalties prescribed in this subsection (7):